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In the Supreme Court
OF THE
United States

OCTOBER TERM, [redacted] 1925

No. 8[redacted] 246

PACIFIC AMERICAN FISHERIES,
Petitioner,
vs.
TERRITORY OF ALASKA,
Respondent.

PETITION FOR CERTIORARI
To the Circuit Court of Appeals for the Ninth Circuit
AND BRIEF IN SUPPORT THEREOF.

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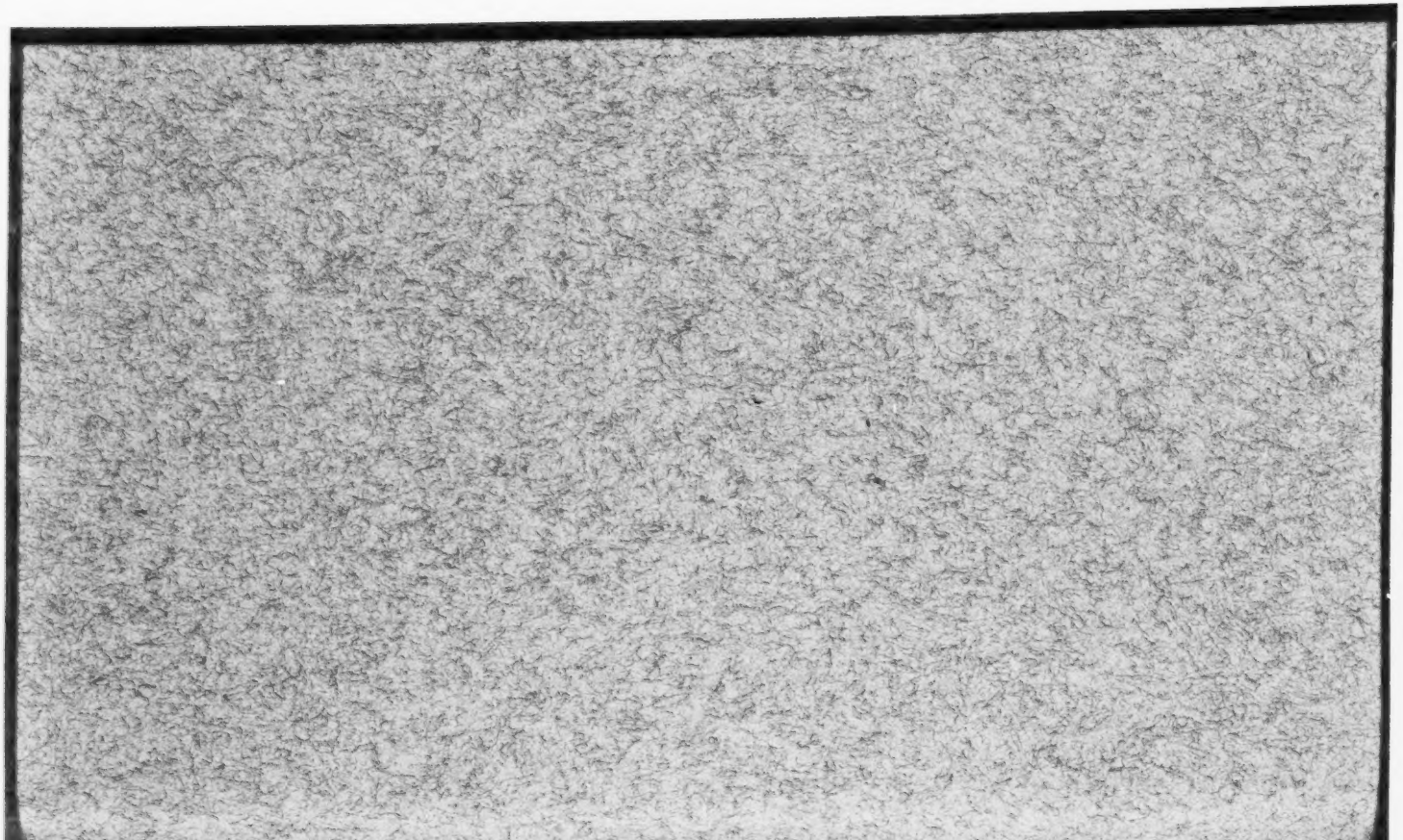

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PETITION FOR CERTIORARI
To the Circuit Court of Appeals for the Ninth Circuit.

Pacific American Fisheries, a corporation organized under the laws of the State of Maine, petitioner herein, respectfully shows the court as follows:

PROCEEDINGS AND DECISION OF THE LOWER COURTS.

The respondent, Territory of Alaska, recovered judgment April 23, 1924, for $9,752.52 and costs (Trans. 77).

Upon writ of error to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed on October 20, 1924, and a rehearing denied on November 24, 1924.

The case comes up upon the complaint, demurrer thereto and answer to the complaint. The complaint is in four counts and alleges generally that the company had at four separate canneries in Alaska canned or packed a certain number of cases of salmon upon which there was due as taxes the sum of $9,437.89 with interest. The demurrer and answer challenged the validity of subdivisions c, e and h of Section 8 of an Act of the Legislature of the Territory of Alaska designated as Chapter 101 of the Laws of 1923 (Session Laws of Alaska, 1923, p. 269). Said Section 8 is as follows:

> "8th: Fisheries.
>
> "(a) Clam canneries, three (3) cents per case.
>
> "(b) Salmon canneries; on kings, reds, sockeyes, ten (10) cents per case.
>
> "(c) On a pack of kings, reds and sockeyes, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of ten thousand (10,000) and not more than twenty-five thousand (25,000), five (5) cents per case; on all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), ten (10) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), fifteen (15) cents per case; on all cases in excess of fifty thousand (50,000), twenty (20) cents per case.

"(d) On medium reds, cohoes, and pinks, four and one-half (4½) cents per case.

"(e) On a pack of medium reds, cohoes, and pinks, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), two (2) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), four (4) cents per case; on all cases in excess of fifty thousand (50,000), six (6) cents per case.

"(f) On chums, three (3) cents per case.

"In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other Territorial taxes paid.

"(g) Salteries: Fifteen (15) cents per one hundred pounds of mild-cured red king salmon; five (5) cents per one hundred pounds on mild-cured white king salmon; ten (10) cents per one hundred pounds on salted codfish; two and one-half (2½) cents per one hundred pounds on all other salted and mild-cured fish.

"(h) Fish traps, fixed or floating, two hundred ($200.00) dollars per annum, so-called dummy traps included; and an additional tax of two ($2.00) dollars per one thousand shall be paid on all fish caught in any one trap in excess of one hundred thousand (100,000).

"(i) Gill nets and stake nets, two ($2.00) dollars per one hundred fathoms, or fraction thereof.

"(j) Seines, ten ($10.00) dollars for the first one hundred fifty (150) fathoms, and five ($5.00) dollars additional for each twenty-five (25) additional fathoms or fraction thereof.

"(k) Fishermen who are not residents of the Territory, five ($5.00) dollars per annum. The term "fishermen" shall mean to include all persons employed on a boat engaged in fishing. This tax on non-resident fishermen shall continue only until January 1, 1924."

The grounds of such challenge were, as far as concerns this petition, succinctly, the following:

1. That the said act, while in form a taxing measure, is in truth one to regulate the catching and canning of salmon contrary to the provisions of Section 3 of the Organic Act of Alaska (37 Statutes at Large 512), which withhold from the Territorial Legislature the right to alter, amend, modify and repeal laws of Congress in force in Alaska relating to the game, fish and fur-seal laws.

2. That the said act is violative of the provisions of the Fourteenth Amendment of the Constitution of the United States in that it denies to the defendant the equal protection of the laws and also abridges the immunities and privileges of citizens of the United States.

3. That the said act does not define what is meant by the word "cannery" and that it is impossible to determine whether the said term refers to a building or to a plant.

The question here presented is concerned only with the validity of subdivisions c, e and h of Section 8. The company has paid the normal tax of 10¢ per case imposed by Subdivision b of said section, but has not paid the additional tax provided by the above other subdivisions.

On June 26, 1906, Congress enacted a statute for the protection and regulation of salmon in Alaska (34 Stat. at Large 478), and this act was in force in 1923 when the law here attacked was passed by the Alaska Legislature (*Auk Bay Salmon Canning Company v. United States,* 300 Fed. 907).

The authorities upon these points are cited in the brief in support of this petition.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of this court, in accordance with its practice, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding it to certify to this court a complete transcript of the record of all proceedings in that court in this cause; and that the transcript herewith presented be ordered to stand as a return to said writ for that purpose; that this court assume jurisdiction of said cause, and to hear and determine the same; and that upon such hearing the judgments of the Circuit Court of Appeals for the Ninth Circuit, and the District Court of the United States for the Territory of Alaska, may be reversed, and

that such orders may be entered and process issued by this court as may be necessary for this purpose.

Dated, San Francisco,
January 7, 1925.

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In the Supreme Court
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No.

PACIFIC AMERICAN FISHERIES, *Petitioner,*

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TERRITORY OF ALASKA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI
To the Circuit Court of Appeals for the Ninth Circuit.

I.
THE ADDITIONAL TAX IS A REGULATION OF THE CATCHING OF SALMON AND THEREFORE VIOLATIVE OF SECTION 3 OF THE ORGANIC ACT OF ALASKA.

Said Section 3 of the Organic Act of Alaska contains the following proviso:

> "Provided, That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other

> general laws of the United States, or to the game, fish and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

It should at the outset be noted that the Circuit Court of Appeals in its opinion expressly stated that this question was a close one, saying (Trans. 103):

> "Unlimited power to tax an industry in one sovereignty seems rather inconsistent with the reservation of a power to regulate that industry by another sovereignty, as the power to tax involves the power to destroy, and may be so exercised as to render any attempt at regulation useless and abortive. *The question presented by the record in this case is, in our opinion, close to the border line*, but we are not prepared to say that the territory has exceeded the limits of its taxing power as heretofore defined by the courts" (italics ours).

The court below also expressly stated that this act was intended to "discriminate in favor of small canneries and against the large ones" (Trans. 104).

The attorney for the territory in his brief below stated (page 11 Brief for Defendant in Error):

> "The tax in question is in a measure regulatory, but that, as we have seen, does not render it void."

His argument there was that the act, although partially at least regulatory, was nevertheless valid because concerned with the *canning* and not the *catching* of salmon. On this point the court below said (Trans. 101):

> "We have no doubt that the business of catching and canning the fish constituted but one business, which business the legislature of the Territory was expressly authorized to tax by the organic act."

The regulatory character of the act is shown by the following characteristics:

1. The additional tax is graduated *upward* upon *volume* alone. This feature distinguishes the act from any other revenue measure heretofore passed. A tax which is imposed in good faith as a revenue measure is never graduated upward as is this tax, and furthermore is based upon *profits* or *income* net or gross as is the Federal Income Tax.

The act in question exacts licenses from some twenty-four different occupations or lines of business. "Fisheries" are named as the Eighth subdivision, thus being classified separately from other lines of business such as "salteries", "cold storage plants", "laundries", "meat markets", "mining", etc. The tax, of course, does not fall upon a fishery, saltery, etc., simply as property or as an ad valorem tax, nor could it do so, nor would such a tax be

valid since it would not be based upon any assessment or valuation of such properties. It falls upon the person, firm or corporation who conducts these plants. Assuming that the tax may properly differentiate *as between these general classes,* it must nevertheless bear equally upon all persons, firms or corporations within a particular class. In the case of the fisheries alone is a second classification attempted; based not upon the character or amount of the business done, but upon *the number of canneries* where the business is carried on. The inequality which bears upon salmon canners so engaged in this same line of business and packing the same character of fish is demonstrable from the terms of the act. Thus, if we take the case of three packers, A, B and C, who each pack 100,000 cases of the same kind of salmon, but who operate respectively 1, 2 and 3 canneries, the additional tax or surtax would be as follows:

A, who operates one cannery with an output of 100,000 cases, must pay:

15,000 cases at 5¢	$ 750.00
15,000 cases at 10¢	1,500.00
10,000 cases at 15¢	1,500.00
50,000 cases at 20¢	10,000.00
Total	$13,750.00

for the whole pack.

B, who operates two canneries with an output of 50,000 cases each, must pay $3,750.00 per cannery, or $7,500.00 for the whole pack.

C, who operates three canneries with an output of 33,333 cases each, must pay for each cannery $1,583.33, or $4,749.99 for the whole pack.

Yet these respective packs are the same in amount and have identically the same market value.

If the legislature had sought revenue only, it could easily have attained this object by increasing the *general* rate of 10¢ per case provided by Subdivision b of Section 8 or increasing the income tax of all salmon companies provided by Subdivision f. The history of the legislation by the Territory on this subject is that beginning in 1913 (Session Laws 1913, page 107) a tax of 7¢ per case on sock-eye and king salmon and ½¢ per case on humpback, cohoe or chum salmon was established. At each session of the legislature thereafter this rate was changed. In 1915 it was reduced to 4¢ per case on kings and reds or sock-eyes, 2¢ per case on medium reds, and 1¢ per case on all others (page 185).* In 1917 the rate was fixed at 4½¢ per case on kings and reds or sock-eyes, 2½¢ per case on medium reds and 2¢ per case on all others (page 202). In 1919 the rate was fixed as 5½¢ per case on kings, reds or sock-eyes; 3½¢ per case on medium reds; and 3¢ per case on all others, but a tax on the net annual income was added (page 91). In 1921 the rate was changed to 7¢ per case on kings and reds or sock-eyes, 3½¢ on medium reds and 3¢ on all others. The income tax feature was retained (page 99).

Thus, that portion of the act of 1923 here attacked for the first time departs from the method of taxa-

* This reference and others to the Alaskan Laws refer to the page of the Session Laws of Alaska for the appropriate year.

tion theretofore adopted by the legislature and attempts to discriminate between a large cannery and a small one through the method of a graduated volume tax. The larger the pack in any one cannery, the higher the additional tax. Only one conclusion can be reached from this change in the legislative method. The legislature was not by this additional tax trying to raise money; it was trying to stop the industry or at least to regulate it.

2. The tax on fish traps, found in Subdivision h, had the same effect. As the statute stood in 1921, a tax of $200.00 per annum was levied on each fish trap (p. 99). In 1923 the tax on traps remained the same, but an additional $2.00 per thousand was imposed upon all fish caught in any one trap in excess of 100,000 (p. 272). Here the act discloses that the object was to discourage a large catch in any single trap by the imposition of a financial burden, which becomes prohibitive as the number of fish caught in any one trap increases.

3. At this same Session of 1923 the legislature passed a closed season law (176). It attempted to establish a closed season for salmon in the waters of Alaska for a period of approximately twenty days during each summer. This act was considered by the court in the *Auk Bay* case, 300 Fed. 907, and declared invalid, the court saying (910):

> "We see no escape from the conclusion that to make the changes in those laws which were attempted to be made by the territorial legislature was to alter, amend and to some extent

repeal the acts of Congress relating to the same subject and was within the prohibition of the Organic Act."

It is apparent that the legislature at its session of 1923 attempted a determined assault on Section 3 of the Organic Act. By the closed season law it made a direct attack and by this so-called occupational or excise tax law it has attacked on the flank. Both of these statutes were declared by the legislature to be emergency measures, becoming effective immediately upon their passage. When taken in connection with the allegations of the answer to the effect that members of the same legislature openly stated that the purpose of the graduated tax was to *regulate the catching of salmon,* the passage of this invalid closed season law is significant.

4. The exemption of chums from the surtax is also significant, the only tax here levied being a flat rate of 3¢ per case, the same as provided in the 1921 statute. It is clear that the legislature regarded chums as being a less valuable fish than the varieties subjected to the surtax, and less subject to extermination, and that therefore no additional restrictions upon their catch was necessary.

5. The act requires each cannery to pay 1% of its net annual income (page 271), no allowance being made for income derived from activities of the company without Alaska. The income tax clause is as follows:

"'In addition to the above tax, salmon canneries shall pay one per cent of their net annual

> income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other Territorial taxes paid.' "

It is significant that *no industry other than mining is required by the statute to pay any sort of an income tax directly or indirectly.* Even mining, which is subject to the payment of an income tax that is likewise discriminatory, is required only to pay an income tax which is graduated downward. Much may be said against the validity of an income tax which is based upon the net proceeds of a company doing an interstate business, where no allowance is made for that proportion of the income accruing outside the state (*State v. Frear,* 148 Wis. 456, 134 N. W. 673). But such a question is not at issue here because this action has been brought by the Attorney General solely for the purpose of recovering from the plaintiff in error the graduated tax on salmon which he claims to be due. But whether the income provision is constitutional or not, its inclusion in the statute is again the clearest sort of evidence that the Legislature intended to impose upon salmon canneries sufficient restrictions to make certain that the canning of fish, and consequently the catching of salmon, would be greatly reduced.

6. The revenue raised by this statute alone is grossly in excess of the needs of the Territory.

Circumstances which we have heretofore pointed out as showing the real nature of the statute have all been taken either from the face of the act itself or from a comparison of the act with other statutory enactments of the Territorial Legislature. However, as this case comes up upon demurrer to the answer, all of the allegations of the answer must be taken as true.

St. Louis v. Knapp Co., 104 U. S. 658;
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94;
Dobbins v. Los Angeles, 195 U. S. 223.

One of these allegations is to the effect that if the tax in question be collected it will result in a revenue grossly in excess of the total appropriations of the Legislature and in excess of the needs of the Territory; in other words, that the Legislature was not looking at all or at least primarily at the revenue side of the bill, but simply trying to regulate the fishing industry of Alaska, a subject matter wholly within the jurisdiction of Congress and of the various federal agencies. The particular portion of the answer containing this allegation is found in subdivision h thereof at page 41 of the Transcript of Record.

Subdivision (h) of the answer alleges that a revenue grossly in excess of any possible revenue necessary for the maintenance of the Territorial Government will result; that the total revenue from this statute will result in a sum of not less than

$863,423.13 per annum; that the appropriations provided by the Legislature for the *two* years 1923-1924 total the sum of $1,411,200.82, leaving an excess of more than $350,000.00 over and above the revenue needed by the Territory or appropriated. The answer then alleges that no public money may be legally expended without a previous appropriation and that there will be other sources of revenue accruing to the Territorial Government on taxes imposed upon other lines of business. The foregoing facts cannot be brushed aside. They are one more link in the chain of strong cumulative evidence going to show that so far as the 8th section of the statute in question is concerned, it is a fish law and not a revenue law.

That the excessiveness of revenue obtained from the operation of a statute is to be considered in determining its constitutionality was held in the case of *Commonwealth v. Alden Coal Co.,* 251 Pa. 134, 96 Atl. 246, 250. In that case the State of Pennsylvania imposed a tax of 2½% upon the value of anthracite coal mined. No tax of any kind was imposed upon bituminous coal. In holding that this tax was unconstitutional, one of the circumstances strongly relied upon by the court was that it would produce more money than the State needed. In this connection the court said:

> "* * * that the tax imposed by the act upon the anthracite exclusively would, if enforced, amount to several million dollars annually, and the one-half thereof returned to the counties in trust for the several boroughs, cities, and town-

ships thereof according to population, would in some cases give to the municipality more than the entire tax raised therein for municipal purposes, and in a great many cases would approximate the total amount raised for municipal purposes, and would bestow upon many boroughs and townships which do not now and never have contained a pound of coal deposited within their limits large sums of money annually for the conduct of their municipal affairs, or for such municipal expenditures as such municipalities may see fit to make.

"Keeping in mind that the one great purpose of legislative classification is to avoid the inequalities that would necessarily result from subjecting all the members or subjects of a natural class to uniformity of rule, is it not apparent that, whatever the purpose of this act, its certain effect would be not only an unjust and unwarranted discrimination in levying the tax, but a like unjust and unwarranted discrimination in its disbursement? Here we have a tax imposed yielding a revenue twice as large in amount as the state's requirements, and, for some undisclosed reason, the one-half of the total paid into the state treasury is directed to be paid over to the treasurers of the nine anthracite producing counties to be divided among the several municipalities therein. * * *"

It may be said that the *Alden* case has been overruled by *Heisler v. Thomas Colliery Co.*, 260 U. S. 245. After the decision in the *Alden* case the Legislature of Pennsylvania again passed a statute similar in many respects to that held unconstitutional in the *Alden* case, except that the amount of the tax was cut in half. The constitutionality of the new act was upheld by the

Supreme Court of that state and the judgment affirmed by the United States Supreme Court in the *Heisler* case. But it is to be noted that the excessiveness of the tax was not an issue in the second case, and rightly so, since the tax rate had been cut in two and there were no allegations in the complaint that the result of the operation of the tax would be to produce an excessive amount of revenue. The *Heisler* case, is, therefore, in no sense in conflict with the *Alden* case so far as the effect of an excessive revenue upon the validity of a tax is concerned.

7. It was the intent and purpose of the Legislature to pass an act regulating the catch of fish and not for revenue purposes.

Subdivision (h) of the third affirmative defense contains the following allegation:

> "In this connection defendant alleges that the Legislature in passing this law well knew that the tax would produce a revenue largely in excess of governmental needs, and that the purpose of the Legislature in imposing such an excessive tax was to regulate the taking of salmon from the territorial waters and to discourage the taking thereof by large concerns such as the defendant."

In subdivision (i) of the third affirmative defense it is alleged:

> "That the purpose of increasing said taxes as aforesaid was to discourage the packers from packing in excess of 10,000 cases of salmon of the varieties of reds, kings and sockeyes, and in excess of 25,000 cases of cohoes, medium reds

and pinks, and to regulate the business of said packers and this defendant in the production of their canneries."

In subdivision (j) of the third affirmative defense there is the following allegation:

> "That said license fees, taxes or charges—will result in a revenue grossly in excess of any possible need of said Territory and that such fact was well known by said Legislature at the time said Acts were enacted; that it was at the time of the passage of said Chapter 101, Alaska Session Laws 1923, openly claimed by the Legislature that the purpose of the passage of said Chapter of the Laws of Alaska 1923 was to regulate the fishing and catching of salmon."

The foregoing allegations which stand here undenied show three things as to the intent of the Legislature in enacting this statute:

1. That it was the intent of the Legislature to regulate fisheries and not to obtain revenue;
2. That the Legislature knew that the revenue realized would be grossly in excess of the needs of the Territory;
3. That the members of the Legislature openly stated before the passage of the statute that their knowledge and their intention was as above stated.

8. All of the circumstances connected with this case tend to show that the Legislature intended to prohibit and to penalize rather than to tax for revenue.

The upward graduated feature of the tax, the income tax clause, the passage of the closed

season law and the exemption of chums from the surtax are all matters appearing either on the face of the act itself or are to be discovered by a comparison of the act with other statutes of Alaska. So far as these matters are concerned there can be no question that they not only show the purpose of the Legislature in passing the tax, but they are pertinent to disclose such purpose.

In the case of *Elmer v. Wallace*, 275 Fed. 86, the court had under consideration the validity of a tax imposed by the State of Alabama upon fresh shrimps. This tax was quadrupled in the case of shrimp taken in and shipped outside the state. The court held that despite the characterization of the act as a revenue measure, this must be regarded as a restriction upon the taking of shrimps, and particularly upon the shipping of shrimps in interstate commerce and shows that the courts always seek the true nature of the statute regardless of the name it bears.

It will probably be claimed that the excessiveness of the revenue raised and the statements contained in the answer with regard to the intent of the Legislature may not be relied upon to show the actual purpose of the legislation, as it has been stated in some cases that the nature of legislation is to be discovered upon its face and not by reference to a characterization of such purpose. Such a contention as this is contained in *Alaska Fish Co. v. Smith*, 255 U. S. 44. That case involved the legality

of a tax in the guise of a license fee of $2.00 per barrel and $2.00 per ton upon persons manufacturing fish oil, fertilizer and fish meal from herring. It was there urged that the tax was prohibitory and was, therefore, a disguised attempt to pass a fish law. This tax is easily distinguishable from the one at bar by reason of the fact that it was not in any way graduated upward, nor did the statute purport on its face to do anything other than raise revenue. The court refused to look to the allegations of the complaint in order to determine the intent of the Legislature. There is nothing in the case to show that the revenue would be grossly or at all in excess of the needs of the Territory or that the members of the Legislature openly asserted at the time of the passage of the act that they intended to regulate fisheries. The *Smith* case is hereafter referred to at length.

Furthermore, any intimations contained in the case with regard to the unimportance of the intent of the Legislature in passing an act must be regarded as having been overruled by the child labor tax case *Bailey v. Drexel Furniture Co.*, 259 U. S. 20. That case holds unconstitutional the latest attempt on the part of Congress to pass a Federal Child Labor Bill. The bill took the form of a so-called excise tax of 10% on the entire net profits of any mine, mill, etc., where children under the age of fourteen years were employed. The court first held that the case was similar in principle to *Hammer v. Dagenhart*, 247 U. S. 251, which had decided that a

federal statute prohibiting the transportation through interstate commerce of goods made at a factory in which children were employed was unconstitutional, there being nothing inherently objectionable in the goods so transported.

This court then held that there is a certain point where a so-called excise tax, because of the manifest purpose of the legislative body, becomes a penalty. As such it may not be upheld where the legislative body did not have both the power to levy an actual excise tax and the right directly and openly to regulate or prohibit the activity in question.

The language in this case is so pertinent to the discussion here that we shall set forth some of it at length (at pp. 36, 37):

> "* * * If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer *solely* from its heavy burden that the act intends a prohibition instead of a tax. * * *
>
> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number

of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

"The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. *Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another.* Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard."

In distinguishing the case of *Veazie Bank v. Fenno,* 8 Wall 533, which case involved the constitutionality of the federal statute putting a 10% tax upon the circulation of the notes of State banks, Mr. Chief Justice Taft said (at p. 41):

> "It will be observed that the sole objection to the tax there was its excessive character. *Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all.* There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern and jurisdiction through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax." (Italics ours.)

The Chief Justice also distinguished *McCray v. United States,* 195 U. S. 27. That was a case in which Congress increased the tax upon yellow oleomargarine from 2¢ to 10¢ per pound, leaving the tax on white oleomargarine at 1¼¢ a pound as it had stood before. It was held by the Supreme Court that this tax was constitutional. Mr. Chief Justice Taft says (at p. 42):

> "* * * It was the same principle as that applied in the Veazie Bank Case. This was that Congress in selecting its subjects for taxation might impose the burden where and as it would and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face as does the law before us the detailed specications of a regulation of a state concern and

> business with a heavy exaction to promote the efficacy of such regulation."

Another case which looks to the legislative intent is *Alaska Pacific Fisheries v. Territory of Alaska,* 236 Fed. 52, 55, in which this court said:

> "It is plain, we think, that our conclusion should be arrived at by assuming that *the great object* of the Legislative Act of April 29, 1915, quoted above was to create revenue, and that in its scheme of license taxes the Legislature had in mind provision for the expense of administration of the Territory." (Italics ours.)

We submit that in the case at bar as in the Child Labor Tax Case there are disclosed many detailed specifications of the attempted regulation of a federal concern and business with a heavy exaction to promote the efficacy of such regulation.

As to the question of the court looking behind the form and language of tax statutes when deciding as to their validity see:

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362;

Collins v. New Hampshire, 171 U. S. 30, 34.

II.

THE CLASSIFICATION IS ARBITRARY AND UNREASONABLE AND THEREFORE VOID.

It is undenied that a taxing power may for the purposes of taxation make certain classifications, but this court has held that such classifications

" 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' Gulf, Colorado and Santa Fe Railway v. Ellis, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560;

Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150.

The question here involved may be briefly stated as follows: "May a Legislature *which has no*

power of regulation impose a discriminatory tax so that a large manufacturer will *simply because he is such large dealer*, be taxed more per unit upon his output than the small manufacturer?" The right of classification must bear some reasonable relation to the object to be attained. In the case of the Alaskan Legislature, this object was and could be simply the collection of revenue. It could not go beyond that, since it had no power of regulation. This case, therefore, presents to this court the question of whether or not a large manufacturer may be taxed more per unit than a small manufacturer without regard to his profits or his net or gross returns or to his regulation.

In the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, this court held that a statute of Kansas, which imposed certain restrictions upon stock yards within the State, and which stock yards for the preceding twelve months should have had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep, was invalid, the court being unanimous upon the point that the statute was in violation of the Fourteenth Amendment, in that it in fact applied only to stock yards within the limits of Kansas City and not to other companies engaged in like business in Kansas, and that therefore it denied to such companies the equal protection of the laws.

The argument which was used by the Attorney General for Kansas in this case, was practically

identical with the arguments used by the Attorney General for Alaska in the instant case. They both asserted that the public had a greater interest in the business of a large stock yard or cannery than it had in the business of smaller ones, and that the Legislature could and indeed should correct that inequity by levying such a tax that the two would become equal.

It is impossible to approach the consideration of this question without realizing its importance. It is only an unusual situation that permits it to be considered, but nevertheless that situation is now before this court.

We are not here concerned with the power of regulation, since Congress has withheld that power from the local Legislature. As said in the opinion in this case, the power to tax is the power to destroy. The amount of the tax is not to be considered. The court must approach the situation as if the Legislature of Alaska had imposed a tax of $100 per case, or any other impossible amount, for all salmon packed in a single cannery over and above 10,000 cases.

It matters not at all as to the amount of the tax. If the Legislature can discriminate in any degree so as to impose a tax upon the output of a cannery *dependent upon the size of that cannery,* then it has the right to extend that power to the X limit.

The question here presented is not that which the court had before it in considering the federal in-

come tax statute (*Brushaber v. Union Pac. R. R. Co.,* 240 U. S. 1), because that statute was concededly passed for the purpose only of *securing revenue,* and the classification there made had only to do with the question of revenue. But from the standpoint of revenue, a distinction as between a large cannery and a small one has no "reasonable and just relation to the act in respect to which the classification is proposed."

This court has decided that a federal income tax may be graduated upon the net profits of the taxpayer. A man whose net profit for the year is $10,000 may be taxed more per dollar than one whose net profit is less than $10,000, but the basis of this classification is one of *profit* or *net earnings.* It has nothing to do with the *volume* of business because the man who packed 100,000 cases of salmon, or who manufactures 1,000,000 tons of steel, may make less money than the one who puts up 20,000 cases, or who manufactures but 100,000 tons. *From a revenue standpoint a classification must be based upon revenue per se.* So far as our investigation has gone, this statute stands by itself. We have been unable to find an act of any legislature which has attempted to classify upward a tax solely upon the ground of volume of business without regard to the profit or net returns received from that business.

Incidents of this fact are numerous. For example, in the *Cotting* case, supra, it was held that the Legislature of Kansas had no right to impose special restrictions upon stock yards graded upon the num-

ber of cattle or hogs or sheep which they annually received.

In the case of *State ex rel. Wyatt v. Ashbrook,* 154 Mo. 375, 55 S. W. 627 (the department store case), it was held that no distinction may be made based upon the *place* where a business is conducted. In that case the law provided that a mercantile establishment should pay more if its business was conducted in one store than the same establishment would have to pay if the same business was transacted in several stores. The court held that such a tax was an unwarranted discrimination against department stores. The same argument is applicable here. The unreasonableness of the surtax provisions in the case at bar is apparent when it is remembered that the discrimination is based not upon geographic location but solely upon the number of the canneries engaged in the pack.

The principle laid down in the *Department Store* case has been followed in California in *In re Dees,* 46 Cal. App. 656 and 50 Cal. App. 11, in holding invalid a law placing a high tax upon the privilege of scalping tickets. In that case the court said (pp. 660, 661):

> "In considering the particular enactment the fact that it purports to be a revenue measure is not conclusive. 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under the solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the

limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the constitution.' (Mugler v. Kansas, 123 U. S. 661, (31 L. Ed. 205, 8 Sup. Ct. Rep. 297, see, also, Rose's U. S. Notes); Ex parte Whitwell, 98 Cal. 78, 79, (35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870).) *With what greater force does this reasoning apply in a case where the enactment purports to be a revenue measure, while it is in substance a prohibitive statute, or at least a regulatory one, as this so plainly appears to be.*

"Considered as a revenue measure, the section under consideration, if it provides for any tax, provides for one upon single sales and not upon a business. It further is directed to a mode of selling without consideration either of essential differences in modes or the volume of business transacted. It cannot be upheld as a revenue measure for these reasons. (Merced County v. Helm, 102 Cal. 159-166, (36 Pac. 399); Ex parte Richardson, 170 Cal. 68, (148 Pac. 213).) As a police measure it is an unwarranted interference with the liberty of citizens of the State and the United States, not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision. (Ex parte Whitwell, 98 Cal. 73, (35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870); People v. Quarg, 149 Cal. 79-81, (117 Am. St. Rep. 115, 9 Ann. Cas. 747, 5 L. R. A. (N. S.) 183, 84 Pac. 766).)" (Italics ours.)

The case of *City of Los Angeles v. Lankershim*, 160 Cal. 800, is also a good one because it points out

that a discrimination is arbitrary and unreasonable if based simply upon size of establishment. The statute in question imposed a certain tax per room per year upon every person operating an office building containing more than thirty rooms. The court said (pp. 802, 803):

> "Surely, a man who owns a building with thirty office rooms for rent is engaged in no different 'occupation' from that of the man alongside of him owning an office building with twenty-nine office rooms to rent, and if, as in the case of this ordinance, a tax is to be levied at the rate of a dollar a room upon the person engaged in the 'occupation' of renting office rooms no reason appears or is shown why, belonging to the same class as they do, the man who rents five office rooms should not pay five dollars if the man who rents fifty is compelled to pay fifty dollars. The contention that, for the purposes of taxation, the municipal council may draw a class line at thirty rooms and declare those who rent thirty rooms and over are engaged in an occupation, while those who rent less than thirty rooms are not engaged in the same occupation, is purely fanciful as would be plainly exemplified if the ordinance imposed a tax upon those who rent from one to thirty rooms and relieved from the tax those who rented over thirty rooms. Yet, if this asserted ground of classification is substantial, the city council would have the power to do precisely this thing.
>
> * * * * * *
>
> "The well-settled rule that 'every intendment is to be indulged in favor of the validity of a municipal ordinance imposing a license fee for the carrying on of a particular business' means that a court will be zealous in its search for any substantial ground for upholding such an

> ordinance when attacked; but it does not mean that the court must shut its ears to reason and declare in every case that *because* an ordinance has been passed there must be valid reasons for its existence."

The following cases hold that the characteristics of the respective classes created must be germane to the main legislative purpose.

Ex parte Franks, 52 Cal. 606;
Ex parte Richardson, 170 Cal. 68;
City of Seattle v. Dencker, 58 Wash. 501, 108 Pac. 1086.

It cannot be said that the surtax bears equally upon all who are engaged "in the business of packing more than 10,000 reds at one cannery." *There is no such business as that,* any more than there is a business consisting of the operation of an office building containing more than thirty rooms. A person runs a cannery or maintains an office building (he does not run a cannery of 10,000 cases—or an office building of 30 rooms) and no distinction may be made in either case for the purpose of taxation so far as volume is concerned.

This surtax does not even have the virtue of a reasonable ratio of increase. The rate per case upon reds packed in one cannery where no more than 10,000 are packed is 10 cents per case. If 25,000 are packed in that cannery the rate is 13 cents per case. If 40,000 are packed the rate is 15 6/10 cents per case. If 50,000 cases are packed the rate is 17½ cents per case and if 100,000 cases

are packed the rate is 23 7/10 cents per case. This ratio of increase is neither proportionate nor reasonable. The only thing that can be said about it is that it is very heavy.

Another illustration of the unfairness of the tax is the one already given, viz., where A, B and C each pack 100,000 cases of the same kind of salmon but where A operates only one cannery, B two, and C three. Under these circumstances, A pays a total tax of $13,750.00, B pays $7,500.00 and C $4,749.99. This shows very clearly that the tax, though graduated, has no relation to the *value* of the pack and especially no relation to *profit* realized by the packer. In other words, there is no fund, as in the case of the Federal Income Tax, upon which the increasingly higher tax rate operates.

Such a tax does not rest upon substantial differences "which bear a just and proper relation to the attempted classification." By the same token, it violates the principle of *Truax v. Raich*, 239 U. S. 33, where a statute of Arizona was held invalid which prohibited any employer of more than five workers from employing a force more than 20% of which would not be qualified electors. And in *Tanner v. Little*, 240 U. S. 369, 383, the court well said:

> "* * * The Statute was held void because there was no authority to deal with that at which the legislation was aimed and this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if

> such authority exists, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the Legislature."

A strong case in our behalf is *Fiscal Court v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 298. In that case the license tax in question imposed a tax upon one, two, three and four-horse wagons, the graduations on the one, two and three-horse wagons being, so far as could be observed, reasonable, whereas the tax upon four-horse wagons was out of all proportion. In the opinion in that case the court readily conceded the proposition that the reasonableness of a classification for the purpose of license taxes is ordinarily something for the legislature to determine but it went on to say that where a classification was manifestly unequal and unreasonable it must fall. The court said:

> *"It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class but it cannot unjustly discriminate between the subdivisions so made."* (Italics ours.)

The allegation contained in the answer to the effect that the statute in question contains no definition of a "cannery" is not merely a technical objection to the phraseology of a statute the meaning of which is reasonably clear. It is an objection which goes to the very root of the tax. As a corporation must pay a different surtax depending upon whether

its salmon are packed in one cannery or in two, a clear definition of the word "cannery" is absolutely essential. (*Gould v. Gould*, 245 U. S. 151.) Does it mean a particular building in which a portion of the canning machinery may be operated or does it mean the plant in any particular location? To anyone familiar with the salmon canning industry, the ambiguity of this term is obvious. For example, if we assume that on the left bank of the Karluk River, a stream not over 30 feet wide, there are located a number of cannery buildings and on the right bank another group of buildings, are these altogether one cannery, two canneries or more? This case comes up upon demurrer to the answer and it is alleged in the answer that the word "cannery" is uncertain in its meaning and that it is impossible to determine whether said term refers to a building or to a plant.

III.

PUBLIC NATURE OF THE QUESTION INVOLVED.

The correct solution of the question presented by this case is of paramount importance to the Territory of Alaska, and also to all of the fishery companies there engaged, for ever since 1913 these questions have come up, and continually there has arisen, the question of the power of the territorial legislature to indirectly control the fishing industry by a statute such as the one now under consideration.

It seems obvious that Congress intended to retain for itself the control of this fishing industry. May the legislature indirectly take this control through the medium of an excise tax? The decision in the *Auk Bay Canning* case runs parallel with the decision in this case. It is of importance to all parties concerned that the limitations and rights imposed upon and conferred by the Organic act be clearly understood.

The question here presented is furthermore of public importance because it presents primarily the question as to whether or not a large manufacturer may be taxed more per unit than a small manufacturer, regardless of any profit the one or the other may realize from his business.

If we are correct in our assumption, the *size* of a business has no legitimate relation to the *profit* or *deficit* of that business.

Your petitioner urges that the question here involved must necessarily at sometime be passed upon by this court. The petitioner had the statutory right to take a direct appeal or sue out a writ of error from the judgment of the district court to this court. This was the procedure adopted in the *Haavik* and *Smith* cases, supra. While necessarily a denial of this petition must conclude this case so far as this present petitioner is concerned, nevertheless other canning companies similarly circumstanced will have the right and undoubtedly will bring this question directly to this court by the above method. It is respectfully submitted,

therefore, that, on account of the public nature of the question involved, it should be passed upon in the present case, thus removing an uncertainty which must prevail until the above direct appeal can be taken.

IV.

THE DECISIONS IN ALASKA FISH CO. V. SMITH, 255 U. S. 44, ALASKA PACIFIC FISHERIES V. ALASKA, 236 FED. 52, AND HAAVIK V. ALASKA PACKERS ASSN., 263 U. S. 510, ARE NOT CONTROLLING HERE.

It is said in the opinion of the court below (Trans. 102) that:

> "It cannot, therefore, be now held, as plaintiff in error urges should be done, that the purpose of the legislature in imposing the license taxes here complained of was a mere *regulation* of the canning business without overruling the views of this court heretofore expressed, which we are not disposed to do."

In none of the cases cited was an act similar to the one here attacked under consideration. In the *Smith* case this court had under review that portion of the Session Laws of 1917 (page 203) imposing a tax of $2.00 per barrel and $2.00 a ton respectively upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring. This was a flat tax. There was no evidence of an attempt to regulate other than appeared from the mere fact that a tax was levied.

The situation would be identical with the one presented if petitioner here had attacked *the normal tax of 10¢ per case* imposed by the Act of 1923.

But your petitioner has recognized that the above decisions have definitely settled this question and it has accordingly paid the normal tax.

The *Alaska Pacific Fisheries* case also was concerned only with a general tax imposed at the session of 1913. There was no graduated provision in this act. It was merely held that the imposition of a tax *as such* was not a fish law opposed to the Organic Act.

The *Haavik* case held that an annual poll tax and license fee imposed only on non-resident fishermen in Alaska was not opposed to the Organic Act. The only question presented was as to whether or not a poll tax was necessarily a fish law. Thus the question presented was similar to that decided in the two last cited cases.

In the present case your petitioner asserts that the statute is regulatory by reason of especial features, which can have no relation to the question of revenue but must if they have any meaning control the catching and canning of salmon and that such was the legislative intent.

The decisions in these cited cases also largely turn upon that provision in the Organic Act permitting the legislature to impose additional taxes

and licenses. We are conceding in this brief that the legislature has such power, but our contention is that the evidence here of regulation is of quite a different character than that which was considered or could have been considered in the above cited cases.

Dated, San Francisco,
January 7, 1925.

Respectfully submitted,
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Warren Gregory,
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H. L. Faulkner,
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Attorneys for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this_____day of January, 1925.

_____

United States Attorney.

_____

Assistant United States Attorney,
Attorneys for Respondent.

Office Supreme Court, U. S.
FILED
NOV 23 1925
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 246

PACIFIC AMERICAN FISHERIES, *Plaintiff in Error*,

vs.

TERRITORY OF ALASKA, *Defendant in Error*.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 844.

PACIFIC AMERICAN FISHERIES, *Plaintiff in Error,*
vs.
TERRITORY OF ALASKA, *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

When this case came to the Circuit Court of Appeals, the case of Aux Bay Canning Company vs. United States was also before that Court. In this case the only question was the validity of an Act of the Territorial Legislature (Chapter 95 Session Laws of 1923, page 176) entitled "An Act to supplement the fish laws of the United States applicable to Alaska, to conserve the salmon supply of Alaska, to provide for closed seasons for salmon fishing and for other purposes and declaring an emergency." This statute is printed in full in the Appendix to Respondent's brief page 47.

As said in the opinion holding this law invalid because opposed to the Organic Act "it created a distinction which did not exist in the law enacted by Congress—a distinction between those who fish for commercial purposes and those

who fish for other purposes" (vid Section 1) "as well as for a longer closed season—over a greater area and increased the penalties for violation." 300 Fed. Rep. 907.

Thus the change attempted was not alone in enlarging the closed season as claimed by defendant in error here.

The Aux case brought before the Court in a very direct way the question of the control of the territory over *all* fishing regulations since the Act there considered provided (Section 4) "This Act shall not be so construed as in anywise to alter, amend, modify or repeal any of the fish laws of the United States applicable to Alaska or any Act of Congress whatsoever relating to the fisheries of Alaska whether designed to regulate the same or passed for any other purpose whatsoever, but all such laws and Acts of Congress shall be and remain in full force and effect. The purpose of this Act is not to alter, amend, modify or repeal any of such laws, but to provide for further and additional regulations of the fisheries with a view of giving additional protection to the salmon and insuring a future supply thereof and this Act shall be construed so as to carry out the intention herein expressed and not otherwise."

The plaintiff in error here had assumed that the decision in the Aux case settled the question to the extent that if a Territorial Act be in fact a "fish law" it is invalid, but since counsel for the Territory has here urged that that decision is erroneous (brief page 6 and page 19) and has frankly maintained that the territory has still control over the fisheries (Brief pp. 4-207), we here restate the substance of the argument there made.

I.

THE ACT OF CONGRESS OF JUNE 26, 1906 (34 Stats. 478) WAS INTENDED TO COVER THE WHOLE FIELD OF FISHERY REGULATION IN ALASKA.

"Section 1 of this act provides for a license tax upon the business of manufacturing fish products;

section 2 contains lengthy and detailed provisions for encouraging the operation of private fish hatcheries and an exemption from taxation in proportion to the fish hatched and liberated; section 3 makes it unlawful to erect any structures at certain points in the waters of Alaska where such obstruction would prevent the ascent of salmon to the sqawning grounds. The Secretary of Commerce is further given authority to remove any such unlawful obstructions; section 4 makes it unlawful to operate any fishing appliances across or within a certain distance of any salmon stream. It also makes it unlawful to operate a seine within one hundred yards of any other fishing appliance or to install a trap within a certain distance of any other fishing appliance; section 5 provides that in certain waters of Alaska it shall be unlawful to fish except with rod, spear or gaff

> 'from six o'clock post-meridian of Saturday of each week until six o'clock ante-meridian of the Monday following',

and also to fish at night in certain streams. It also provides

> 'That throughout the weekly closed season herein prescribed the gate, mouth or tunnel of all stationary and floating traps shall be closed, etc. ';

section 6 provides that the Secretary of Commerce may set aside any streams or lakes for spawning grounds in which fish may be limited or entirely prohibited. It also provides that the Secretary of Commerce may establish closed seasons or *limit or prohibit fishing entirely for one year or more* within a stream or within a certain distance of the mouth of the stream when in his judgment the number of salmon being taken from said stream is larger than its natural production. It likewise provides that such powers shall be exercised only after all persons interested have been given notice and a hearing, and further, that any order so made shall not be effective before the year after that in which it is made. It further provides that such

limitation shall not apply to persons who keep the streams in which they fish fully stocked by artificial means; section 7 makes it unlawful to can salmon more than forty-eight hours after it has been caught; section 8 makes it unlawful wantonly to waste or destroy salmon or other food fish; section 9 makes it unlawful to misbrand any can of fish by misrepresenting its contents; section 10 provides for 'detailed annual reports' to the Secretary of Commerce covering all facts in connection with the operation of any salmon cannery or other fishing establishment; section 11 provides

> 'that the catching or killing, except with rod, spear or gaff of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions of this act, and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this act';

section 12 provides for employees of the Secretary of Commerce to investigate and inspect fishing establishments; section 13 provides penalties for violations of the act and for the forfeiture of apparatus used in violation of the Act. The penalty is not exceeding $1,000 or imprisonment for not more than ninety days, or both, and also a further fine of not more than $250 per day for a violation of section 4; section 14 provides for the venue of actions, section 15 repeals inconsistent laws and section 16 provides for the taking effect of the act immediately."

This Act is given in the appendix and was passed six years before the passage of the Ogranic Act and it is still in force as amended by the Act of June 6, 1924.

II.

THIS AMENDED ACT DEMONSTRATES THAT CONGRESS UP TO THE PRESENT TIME HAS ALWAYS RETAINED THE FULL CONTROL OF FISHERY REGULATIONS APPLICABLE TO ALASKA.

The title and first section of the Act of June 6, 1924 (43 Stat. 4647) is as follows:

> "AN ACT FOR THE PROTECTION OF THE FISHERIES OF ALASKA, AND FOR OTHER PURPOSES.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be use therein; (b) *limit the catch of fish to be taken from any area;* (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given; Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that

no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder." (Italics here and elsewhere ours.)

The later Act is as stated an *amendment* to the Act of June 26, 1906, sections 3, 4 and 5 of that Act being specifically amended and sections 6 and 13 repealed. Sections 2, 7, 8, 9, 10, 11, 12, 14, 15 and 16 of the earlier Act are still in effect as stated in Department Circular No. 251 (Eleventh Edition) of the Bureau of Fisheries, Department of Commerce issued December 2, 1924.

Section 8 of the Act of June 6, 1924, quoted by counsel for the Territory on pages 19 and 20 of his brief *adds* nothing to the powers of the Territorial Legislature previously possessed by it. If it has any effect, it is that the power to "impose additional taxes or licenses" is the *only* right of the Legislature which Congress recognized in fishery control.

III.

THE POWER OF CONGRESS TO LEGISLATE ON TERRITORIAL MATTERS IS PARAMOUNT.

Late Corporation of the Church of Jesus Christ of Latter Day Saints vs. United States, 136 U. S. 1
Boyd vs. Nebraska, 143 U. S. 135
Board of Public Utility Commissioners vs. Ynchausti & Co., 251 U. S. 401

IV.

WHEN CONGRESS ACTS IN SUCH A WAY AS TO MANIFEST A PURPOSE TO EXERCISE ITS CONCEDED AUTHORITY THE REGULATING POWER OF THE STATE OR TERRITORY CEASES TO EXIST.

Adams Express Co. vs. Croninger, 226 U. S. 491
Missouri Kansas and Texas R. R. vs. Harriman, 227 U. S. 657
Atchison & Topeka Ry. vs. Harold, 241 U. S. 371
St. Louis Iron Mountain & Southern Ry. vs. Edwards, 227 U. S. 265

The foregoing cases dealt with State regulations which were additional to but not in terms inconsistent with congressional legislation. The following hold that the States have no power to add to or supplement the Acts of Congress in such relation.

Prigg vs. Pennsylvania, 16 Peters 539
Erie Railroad Company vs. New York, 233 U. S. 671
Charleston & Western Carolina R. R. Co. vs. Varnville Furniture Co., 237 U. S. 597
Southern Railway Company vs. Railroad Commission of Indiana 236 U. S. 439

The rule is the same where Congress (as here) has empowered an Executive or Administrative Body to promulgate regulations.

Actiesselskahet Ingrid vs. Central Railroad, 216 Fed. 72

The rule applies with equal or greater force to territories.

Betsch vs. Umphrey, 270 Fed. 45
Territory vs. Lee, 2 Montana 124
Allen vs. Reed, 10 Okla. 105, 60 Pac. 782

The above is of course made doubly certain by the specific denial of jurisdiction over "game, fish and fur seal laws."

V.

FISHING AND CANNING ARE ONE BUSINESS.

The Act (Chapter 101, Laws of 1923) here assailed provides that any person etc. prosecuting the following *lines of business* shall obtain a license for the respective lines of business, viz.

8th—*Fisheries.*

(c) *On a pack of kings, reds and sockeyes* counted together at any one cannery, etc.

The only tax for operating a *cannery* as such is imposed by subdivisions (a) and (b) which is not in issue here since it has been paid (Record pp. 3-5-7-9)

It was said in State vs. Hume (Oregon), 95 Pacific Rep. 208:

> "Fish must be caught before they can be canned and any legislation that tends to restrict the canning of salmon necessarily limits the number of such fish that will be taken for the chief demand for salmon is for canning purposes and a statute that circumscribes the demand necessarily diminishes the supply."

VI.

THE DEBATES IN CONGRESS.

The debate on the fisheries commences on page 5279 of the Congressional Record and concludes at page 6288 (Vol. 48, Part 6 of the Record Session of the Sixty-second Congress).

The portion set out in counsel's brief is but a small part of the whole discussion:

It should be explained in this connection that section 3 as originally proposed by Mr. Wickersham provided that the Legislature should not alter, amend, modify and repeal the customs, internal revenue, postal and other general laws. The same provision was by amendment made applicable to the game and fish laws in consequence of the debate.

The following was also said:

> Mr. Mann. "Under the provisions of this Bill would the Territorial Legislature have any jurisdiction over the matter of game and fisheries?
>
> Mr. Wickersham. Undoubtedly, except as it might come in conflict with an Act of Congress.
>
> Mr. Mann. Does not the Bill expressly provide that if it does come in conflict with the Act of Congress, the Territorial Legislature may repeal the Act of Congress?
>
> Mr. Wickersham. Not at all.
>
> Mr. Mann. I am very glad to hear the gentleman's opinion about that, although it is very plainly in the bill." (p. 5279.)
>
> Mr. Butler. " * * * Is there anything anywhere in this proposed Act that would authorize the Legislature to change the laws in regard to conservation *so as to interfere with the policies of the Government in any way in that direction?*
>
> Mr. Wickersham. *I think not.*" (p. 5284.)
>
> Mr. Wickersham. "I think no citizen of Alaska has been convicted of a violation of the game laws.
>
> Mr. Mann. I have no doubt that is true. I doubt whether it is very practical to convict a citizen of

> Alaska under ordinary conditions in the courts up there, for the same reason if they had power to change the game laws. I doubt whether it would be possible to have a law preserving the game of Alaska." (p. 5285.)

As said by the Circuit Court of Appeals in the Aux case where this same point was raised, "Nothing that was said, however, is authoritative or of such a character as to relieve this Court of the responsibility of construing the organic Act according to its terms" citing;

> United States vs. Union Pacific R. R., 91 U. S. 72
> United States vs. Freight Assn., 166 U. S. 290

Other cases to the same effect are—
Downes vs. Bidwell 182 U. S. 244.
Aldridge vs. Williams 3 Howard 9.
Maxwell vs. Don 176 U. S. 581.

The utmost that may be said for this discussion is that the members were not all of the same opinion—

Respectfully submitted,

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Blair S. Shuman,
Attorneys for Plaintiff in Error.

APPENDIX.

Act of June 26, 1906.

Chap. 3547—An Act for the protection and regulation of the fisheries of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirteenth, eighteen hundred and sixty-seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, in lieu of all other license fees and taxes therefore and thereon pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton. The payment and collection of such license taxes shall be under and in accordance with the provisions of the Act of March third, eighteen hundred and ninety-nine, entitled "An Act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district," and amendments thereto.

SEC. 2. That the catch and pack of salmon made in Alaska by the owners of private salmon hatcheries operated in Alaska shall be exempt from all license fees and taxation of every nature at the rate of ten cases of canned salmon to every one thousand red or king salmon fry liberated, upon the following conditions:

That the Secretary of Commerce and Labor may from time to time, and on the application of the hatchery owner shall, within a reasonable time thereafter, cause such private hatcheries to be inspected for the purpose of determining the character of their operations, efficiency, and productiveness, and if he approve the same shall cause notice of such approval to be filed in the office of the clerk or deputy clerk of the United States district court of the division of the district of Alaska wherein any such hatchery of the and shall also notify the owners of such hatchery of the action taken by him. The owner, agent, officer, or superintendent of any hatchery the effectiveness and productive-

ness of which has been approved as above provided shall, between the thirtieth day of June and the thirty-first day of December of each year, make proof of the number of salmon fry liberated during the twelve months immediately preceding the thirtieth day of June, by a written statement under oath. Such proof shall be filed in the office of the clerk or deputy clerk of the United States district court of the division of the district of Alaska wherein such hatchery is located, and when so filed shall entitle the respective hatchery owners to the exemption as herein provided; and a false oath as to the number of salmon fry liberated shall be deemed perjury and subject the offender to all the pains and penalties thereof. Duplicates of such statements shall also be filed with the Secretary of Commerce and Labor. It shall be the duty of such clerk or deputy clerk in whose office the approval and proof heretofore provided for are filed to forthwith issue to the hatchery owner, causing such proofs to be filed, certificates which shall not be transferable and of such denominations as said owner may request (no certificate to cover fewer than one thousand fry), covering in the aggregate the number of fry so proved to have been liberated; and such certificates may be used at any time by the person, company, corporation, or association to whom issued for the payment pro tanto of any license fees or taxes upon or against or on account of any catch or pack of salmon made by them in Alaska; and it shall be the duty of all public officials charged with the duty of collecting or receiving such license fees or taxes to accept such certificates in lieu of money in payment of all license fees or taxes upon or against the pack of canned salmon at the ratio of one thousand fry for each ten cases of salmon. No hatchery owner shall obtain the rebates from the output of any hatchery to which he might otherwise be entitled under this Act unless the efficiency of said hatchery has first been approved by the Secretary of Commerce and Labor in the manner herein provided for.

SEC. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red-salmon stream where the same is less than five hundred feet in

width, the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed.

SEC. 4. That it shall be unlawful to lay or set any net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red-salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.

SEC. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by rod, spear, or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock post-meridian of Saturday of each week until six o'clock ante-meridian of the Monday following, or to fish for, or catch, or kill in any manner or by any appliances except by rod, spear, or gaff, any salmon in any stream of less than one hundred yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. Throughout the weekly close season herein prescribed the gate, mouth, or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the "heart" of such traps on each side next to the "pot" shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

SEC. 6. That the Secretary of Commerce and Labor may, in his discretion, set aside any streams or lakes as preserves for spawning grounds, in which fishing may be limited or entirely prohibited; and when, in his judgment, the re-

sults of fishing operations in any stream, or off the mouth thereof, indicate that the number of salmon taken is larger than the natural production of salmon in such stream, he is authorized to establish close seasons or to limit or prohibit fishing entirely for one year or more within such stream or within five hundred yards of the mouth thereof, so as to permit salmon to increase: *Provided, however,* That such power shall be exercised only after all persons interested shall be given a hearing, of which due notice must be given by publication; and where the interested parties are known to the Department they shall be personally notified by a notice mailed not less than thirty days previous to such hearing. No order made under this section shall be effective before the next calendar year after same is made: *And provided further,* That such limitations and prohibitions shall not apply to those engaged in catching salmon who keep such streams fully stocked with salmon by artificial propagation.

SEC. 7. That it shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed.

SEC. 8. That it shall be unlawful for any person, company, or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska.

SEC. 9. That it shall be unlawful for any person, company, or corporation canning, salting, or curing fish of any species in Alaska to use any label, brand, or trade-mark which shall tend to misrepresent the contents of any package of fish offered for sale: *Provided,* That the use of the terms "red," "medium red," "pink," "chum," and so forth, as applied to the various species of Pacific salmon under present trade usages shall not be deemed in conflict with the provisions of this Act when used to designate salmon of those known species.

SEC. 10. That every person, company, and corporation engaged in catching, curing, or in any manner utilizing fishery products, or in operating fish hatcheries in Alaska, shall make detailed annual reports thereof to the Secretary of Commerce and Labor, on blanks furnished by him, covering all such facts as may be required with respect thereto for the information of the Department. Such reports shall be sworn to by the superintendent, manager, or other per-

son having knowledge of the facts, a separate blank form being used for each establishment in cases where more than one cannery, saltery, or other establishment is conducted by a person, company, or corporation, and the same shall be forwarded to the department at the close of the fishing season and not later than December fifteenth of each year.

SEC. 11. That the catching or killing, except with rod, spear, or gaff, of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions if this Act, and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this Act.

SEC. 12. That to enforce the provisions of this Act and such regulations as he may establish in pursuance thereof, the Secretary of Commerce and Labor is authorized and directed to depute, in addition to the agent and assistant agent of salmon fisheries now provided by law, from the officers and employees of the Department of Commerce and Labor, a force adequate to the performance of all work required for the proper investigation, inspection, and regulation of the Alaskan fisheries and hatcheries, and he shall annually submit to Congress estimates to cover the cost of the establishment and maintenance of fish hatcheries in Alaska, the salaries and actual traveling expenses of such officials, and for such other expenditures as may be necessary to carry out the provisions of this Act.

SEC. 13. That any person, company, corporation, or association violating any provision of this Act or any regulation established in pursuance thereof shall, upon conviction thereof, be punished by a fine not exceeding one thousand dollars or imprisonment at hard labor for a term of not more than ninety days, or by both such fine and imprisonment, at the discretion of the court; and in case of the violation of any of the provisions of section four of this Act and conviction thereof a further fine of not more than two hundred and fifty dollars per diem may, at the discretion of the court, be imposed for each day such obstruction is maintained. And every vessel or other apparatus or equipment used or employed in violation of any provision of this Act, or of any regulation made thereunder, may be seized by order of the Secretary of Commerce and Labor, and shall

be held subject to the payment of such fine or fines as may be imposed.

SEC. 14. That the violation of any provision of this Act may be prosecuted in any district court of Alaska or any district court of the United States in the States of California, Oregon, or Washington. And it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act and the rules and regulations made thereunder. And it shall be the duty of the district attorney to whom any violation is reported by any agent or representative of the Department of Commerce and Labor to institute proceedings necessary to carry out the provisions of this Act.

SEC. 15. That all Acts or parts of Acts inconsistent with the provisions of this Act are, so far as inconsistent, hereby repealed.

SEC. 16. That this Act shall take effect and be in force from and after its passage.

Approved, June 26, 1906.

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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 246

PACIFIC AMERICAN FISHERIES,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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No.

PACIFIC AMERICAN FISHERIES,
Plaintiff in Error,
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Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This is an action brought by the Territory of Alaska to recover from the plaintiff in error, a corporation engaged in the business of canning and packing salmon in Alaska, the sum of nine thousand four hundred thirty-seven and 89/100 dollars ($9,437.89) with interest and costs, as being the alleged portion of a tax due and unpaid. The tax was imposed by a statute enacted by the Legislature of Alaska in 1923. (Chapter 101, Session Laws of Alaska, 1923, pages 269-276 of Statute. That portion of the act which is

pertinent to this case is set forth in the Appendix to this brief.) This statute is an amendment of Chapter 31 of the Territorial Laws of 1921. (Page 269 of Statute.)

The particular portions of the Act of 1923 here under consideration are subdivisions c, d, e and f of Section 8. (Page 271 of Statute.) The statute purports to levy an excise tax upon the prosecution of certain designated lines of business or profession in the Territory, practically every field of endeavor being covered. The amount of the tax is fixed arbitrarily in each instance. Section 8, which imposes a tax upon fisheries, is made up of three component parts. The first of these is a flat tax of a certain amount per case on all salmon packed, the per centum of the tax varying with the variety of salmon. (Subds. b, d, f.) The second is a surtax graduated upward and based upon the number of cases packed in a particular cannery, certain varieties of salmon not being covered by this surtax. (Subds. c, e.) The third is an income tax of one (1) per cent of the net annual income of the cannery.

In this case the plaintiff in error has paid the flat tax but has declined to pay the surtax and the action was instituted by the Attorney General of the Territory to compel its payment.

The pleadings in the case are the complaint, a demurrer thereto upon general and special grounds, an answer to the complaint with a plea in abatement, a demurrer to the answer and plea in abatement on general grounds. The demurrers to the answer and plea were sustained. Thereupon both plaintiff and defendant below moved for judgment upon the plead-

ings and an order was made denying the motion of defendant for such judgment and granting the motion of plaintiff. The judgment was entered on April 23, 1924.

Plaintiff in error here claims:

a. That the act in question is in truth and fact an attempt to regulate the fisheries and therefore contrary not only to the Organic Act but also to the license issued by the Department of Commerce of the United States to plaintiff in error permitting it to take salmon from the territorial waters of Alaska in accordance with the terms and conditions of such license.

b. That the purpose of the said surtax was to discourage packers from packing in excess of ten thousand cases of salmon in any one cannery, and that the regulatory character of the act is further shown by the tax on fish traps (subdivision h), which is graded by the number of fish caught in any one trap. (Page 44.)

c. That the attempted arbitrary classification of the tax on fisheries by the number of cases packed in each cannery is violative of the provisions of the Fourteenth Amendment of the Constitution of the United States and also of the Fifth Amendment of the Constitution, and that a greater liability for taxation is thereby imposed upon a firm or corporation which conducts its business in a single salmon cannery than upon a firm or corporation engaged in the same business which secures its pack from more than one cannery.

d. That the act in question does not define what is meant by the word "cannery" and that therefore it is impossible to determine whether the said word applies to a single building in which the canning operations may be carried on, or to the canning plant of a particular locality, which may include several cannery buildings.

II.

SPECIFICATION OF ERRORS RELIED UPON.

Plaintiff in error in this brief relies upon the assignments of error (Trans. 79) to the effect that the court erred:

1. In overruling the demurrer of plaintiff in error to the complaint and also the demurrers to the separate causes of action therein stated;

2. In sustaining the demurrer of the defendant in error to the first, second, third and fourth affirmative answers and defenses contained in the answer of the plaintiff in error;

3. In sustaining the demurrer of the defendant to the plea in abatement of the plaintiff in error;

4. In granting the motion of the defendant in error for a judgment upon the pleadings and in entering a judgment in favor of the defendant in error and against the plaintiff in error.

The question raised by this brief is the validity of a tax imposed by subdivisions c and e of Section 8 of the 1923 Statute above cited.

III.

BRIEF OF ARGUMENT.

1. The Additional Tax or Surtax is a Regulation of the Catching of Salmon and Therefore Violative of Section 3 of the Organic Act of Alaska.

On August 24, 1912, Congress enacted a law creating a Legislative Assembly for the Territory of Alaska, which is commonly spoken of as the Organic Act. (37 Stats. at Large 512.) This act differed fundamentally from previous acts passed by Congress with reference to other territories, since it expressly withheld from the authority of the new Territorial Legislature jurisdiction over certain important elements of general governmental control. The proviso of Section 3 is as follows:

> "Provided, That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States, *or to the game, fish and fur-seal laws* and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes', approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof; Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." (Italics here and elsewhere in this brief are ours.)

By this proviso Congress made it clear that it intended to retain jurisdiction over the excepted matters among which are the laws relating to fish.

On June 26, 1906, Congress enacted a statute for the protection and regulation of the salmon fisheries of Alaska (34 Stats. 478, Comp. St. Sections 3628-3643), and it has been directly held by the Circuit Court of Appeals for the Ninth Circuit that this Congressional Act was in full force and effect in 1923 when the Territorial Legislature passed the law now here attacked. (*Auk Bay Salmon Canning Company v. United States,* 300 Fed. 907.) By the express terms, therefore, of the Organic Act, as well as by the decision last cited, it is clear that if said subdivisions c and e of Section 8 of Chapter 101 of the Territorial Laws of 1923 is in truth and fact a "fish law," it is unenforceable as being an attempt to cover a field over which the Legislature has no jurisdiction.

It should at the outset be noted that the learned Circuit Court of Appeals in its opinion expressly stated that this question was a close one, saying (Trans. 103):

> "Unlimited power to tax an industry in one sovereignty seems rather inconsistent with the reservation of a power to regulate that industry by another sovereignty, as the power to tax involves the power to destroy, and may be so exercised as to render any attempt at regulation useless and abortive. *The question presented by the record in this case is, in our opinion, close to the border line,* but we are not prepared to say that the territory has exceeded the limits of its taxing power as heretofore defined by the courts."

The court below also expressly stated that this act was intended to "discriminate in favor of small canneries and against the large ones." (Trans. 104.)

The attorney for the Territory in his brief below stated (page 11 Brief for Defendant in Error):

> "The tax in question is in a measure regulatory, but that, as we have seen, does not render it void."

His argument there was that the act, although partially at least regulatory, was nevertheless valid because concerned with the *canning* and not the *catching* of salmon. On this point the court below said (Trans. 101):

> "We have no doubt that the business of catching and canning the fish constituted but one business, which business the legislature of the Territory was expressly authorized to tax by the organic act."

The regulatory character of the act is shown by the following characteristics:

a. *The additional tax is graduated upward upon volume alone.* This feature distinguishes the act from any other revenue measure heretofore passed. A tax which is imposed in good faith as a revenue measure is never graduated upward as is this tax, and furthermore is based upon *profits* or *income* net or gross as is the Federal Income Tax.

The act in question exacts licenses from some twenty-one different occupations or lines of business. "Fisheries" are named as the Eighth subdivision, thus being classified separately from other lines of business such as "salteries", "cold storage plants", "laundries", "meat markets", "mining", etc. The tax, of course, does not fall upon a fishery, saltery, etc., simply as property or as an ad valorem tax, nor

could it do so, nor would such a tax be valid since it would not be based upon any assessment or valuation of such properties. It falls upon the person, firm or corporation who conducts these plants. Assuming that the tax may properly differentiate *as between these general classes,* it must nevertheless bear equally upon all persons, firms or corporations within a particular class. In the case of the fisheries alone is a second classification attempted; based not upon the character or amount of the business done, but upon *the number of canneries* where the business is carried on. The inequality which bears upon salmon canners so engaged in this same line of business and packing the same character of fish is demonstrable from the terms of the act. Thus, if we take the case of three packers, A, B and C, who each pack 100,000 cases of the same kind of salmon, but who operate respectively 1, 2 and 3 canneries, the *additional tax or surtax* would be as follows:

A, who operates one cannery with an output of 100,000 cases, must pay for the surtax:

15,000 cases at 5¢	$ 750.00
15,000 cases at 10¢	1,500.00
10,000 cases at 15¢	1,500.00
50,000 cases at 20¢	10,000.00
Total	$13,750.00

for the whole pack.

B, who operates two canneries with an output of 50,000 cases each, must pay $3,750.00 per cannery, or $7,500.00 for the whole pack.

C, who operates three canneries with an output of 33,333 cases each, must pay for each cannery $1,583.33, or $4,749.99 for the whole pack.

Yet these respective packs are the same in amount and have identically the same market value.

If the Legislature had sought revenue only, it could easily have attained this object by increasing the *general* rates per case provided by subdivisions b, d, and e of Section 8, or increasing the income tax of all salmon companies provided by subdivision f. The history of the legislation by the Territory on this subject is that beginning in 1913 (Session Laws 1913, page 107) a tax of 7¢ per case on sock-eye and king salmon and ½¢ per case on humpback, coho or chum salmon was established. At each session of the Legislature thereafter this rate was changed. In 1915 it was reduced to 4¢ per case on kings and reds or sock-eyes, 2¢ per case on medium reds, and 1¢ per case on all others. (Page 185).* In 1917 the rate was fixed at 4½¢ per case on kings and reds or sock-eyes, 2½¢ per case on medium reds and 2¢ per case on all others. (Page 202.) In 1919 the rate was fixed as 5½¢ per case on kings, reds or sock-eyes; 3½¢ per case on medium reds; and 3¢ per case on all others, but a tax on the net annual income was added. (Page 91.) In 1921 the rate was changed to 7¢ per case on kings and reds or sock-eyes, 3½¢ on medium reds and 3¢ on all others. The income tax feature was retained. (Page 99.)

Thus, that portion of the Act of 1923 here attacked for the first time departs from the method of taxation theretofore adopted by the Legislature and attempts to *discriminate between a large cannery and a*

* This reference and others to the Alaskan Laws refer to the page of the Session Laws of Alaska for the appropriate year.

small one through the method of a graduated volume tax. The larger the pack in any one cannery, the higher the additional tax. Only one conclusion can be reached from this change in the legislative method. The Legislature was not by this additional tax trying to raise money; it was trying to stop the industry or at least to regulate it.

b. *The tax on fish traps, found in subdivision h, had the same effect.* As the statute stood in 1921, a tax of $200.00 per annum was levied on each fish trap. (Page 99.) In 1923 the tax on traps remanied the same, *but an additional $2.00 per thousand was imposed upon all fish caught in any one trap in excess of 100,000.* (Page 272.) Here the act discloses that the object was to discourage a large catch in any single trap by the imposition of a financial burden, which becomes prohibitive as the number of fish caught in any one trap increases.

c. *At this same session of 1923 and on the preceding day the Legislature passed a closed season law.* (Page 176.) It attempted to establish a closed season for salmon in the waters of Alaska for a period of approximately twenty days during each summer. This act was considered by the court in the *Auk Bay* case, 300 Fed. 907, and declared invalid, the court saying (page 910):

> "We see no escape from the conclusion that to make the changes in those laws which were attempted to be made by the territorial legislature, was to alter, amend and to some extent repeal the acts of Congress relating to the same subject and was within the prohibition of the Organic Act."

It is apparent that the Legislature at its session of 1923 attempted a determined assault on Section 3 of the Organic Act. By the closed season law it made a direct attack and by this so-called occupational or excise tax law it has attacked on the flank. Both of these statutes were declared by the Legislature to be emergency measures, becoming effective immediately upon their passage. When taken in connection with the allegations of the answer to the effect that members of the same Legislature openly stated that the purpose of the graduated tax was to *regulate the catching of salmon*, the passage of this invalid closed season law is significant.

d. *The exemption of chums (subd. f) from the surtax is also significant, the only tax here levied being a flat rate of 3¢ per case, the same as provided in the 1921 Statute.* It is clear that the Legislature regarded chums as being a less valuable fish than the varieties subjected to the surtax, and less subject to extermination, and that therefore no additional restrictions upon their catch was necessary.

e. *The act requires each cannery to pay 1% of its net annual income (page 271), no allowance being made for income derived from activities of the company without Alaska.* The income tax clause is as follows:

> "'In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of in-

terest on bonds or money borrowed except on account of other Territorial taxes paid.' "

It is significant that *no industry other than mining is required by the statute to pay any sort of an income tax directly or indirectly.* Even mining, which is subject to the payment of an income tax that is likewise discriminatory, is required only to pay an income tax which is graduated downward. Much may be said against the validity of an income tax which is based upon the net proceeds of a company doing an interstate business, where no allowance is made for that proportion of the income accruing outside the state. (*State v. Frear,* 148 Wis. 456, 134 N. W. 673.) But such a question is not at issue here because this action has been brought by the Attorney General solely for the purpose of recovering from the plaintiff in error the graduated tax on salmon which he claims to be due. But whether the income provision is constitutional or not, its inclusion in the statute is again the clearest sort of evidence that the Legislature intended to impose upon salmon canneries sufficient restrictions to make certain that the canning of fish, and consequently the catching of salmon, would be greatly reduced.

f. *The revenue raised by this statute alone is grossly in excess of the needs of the Territory.* Circumstances which have heretofore been pointed out as showing the real nature of the statute have all been taken either from the face of the act itself or from a comparison of the act with other statutory enactments of the Territorial Legislature. However,

as this case comes up upon demurrer to the answer, all of the allegations of the answer must be taken as true.

St. Louis v. Knapp Co., 104 U. S. 658;
American School of Magnetic Healing v. Mc. Annulty, 187 U. S. 94;
Dobbins v. Los Angeles, 195 U. S. 223.

One of these allegations is to the effect that if the tax in question be collected it will result in a revenue grossly in excess of the total appropriations of the Legislature and in excess of the needs of the Territory; in other words, that the Legislature was not looking at all or at least primarily at the revenue side of the bill, but simply trying to regulate the fishing industry of Alaska, a subject matter wholly within the jurisdiction of Congress and of the various federal agencies. The particular portion of the answer containing this allegation is found in subdivision h thereof at page 41 of the Transcript of Record.

Subdivision (h) of the answer alleges that a revenue grossly in excess of any possible revenue necessary for the maintenance of the Territorial Government will result; that the total revenue from this statute will result in a sum of not less than $863,423.13 per annum; that the appropriations provided by the Legislature for the *two* years 1923-1924 total the sum of $1,411,200.82, leaving an excess of more than $350,000.00 over and above the revenue needed by the Territory or appropriated. The answer then alleges that no public money may be legally expended without a previous appropriation and that there will be other

sources of revenue accruing to the Territorial Government on taxes imposed upon other lines of business. The foregoing facts cannot be brushed aside. They are one more link in the chain of strong cumulative evidence going to show that so far as the 8th section of the statute in question is concerned, it is a fish law and not a revenue law.

That the excessiveness of revenue obtained from the operation of a statute is to be considered in determining its constitutionality was held in the case of *Commonwealth v. Alden Coal Co.*, 251 Pa. 134, 96 Atl. 246, 250. In that case the State of Pennsylvania imposed a tax of 2½% upon the value of anthracite coal mined. No tax of any kind was imposed upon bituminous coal. In holding that this tax was unconstitutional, one of the circumstances strongly relied upon by the court was that it would produce more money than the state needed. In this connection the court said:

> "* * * that the tax imposed by the act upon the anthracite exclusively would, if enforced, amount to several million dollars annually, and the one-half thereof returned to the counties in trust for the several boroughs, cities, and townships thereof according to population, would in some cases give to the municipality more than the entire tax raised therein for municipal purposes, and in a great many cases would approximate the total amount raised for municipal purposes, and would bestow upon many boroughs and townships which do not now and never have contained a pound of coal deposited within their limits large sums of money annually for the conduct of their municipal affairs, or for such municipal expenditures as such municipalities may see fit to make.

> "Keeping in mind that the one great purpose of legislative classification is to avoid the inequalities that would necessarily result from subjecting all the members or subjects of a natural class to uniformity of rule, is it not apparent that, whatever the purpose of this act, its certain effect would be not only an unjust and unwarranted discrimination in levying the tax, but a like unjust and unwarranted discrimination in its disbursement? Here we have a tax imposed yielding a revenue twice as large in amount as the state's requirements, and, for some undisclosed reason, the one-half of the total paid into the state treasury is directed to be paid over to the treasurers of the nine anthracite producing counties to be divided among the several municipalities therein. * * *"

It may be said that the *Alden* case has been overruled by *Heisler v. Thomas Colliery Co.*, 260 U. S. 245. After the decision in the *Alden* case the Legislature of Pennsylvania again passed a statute similar in many respects to that held unconstitutional in the *Alden* case, except that the amount of the tax was cut in half. The constitutionality of the new act was upheld by the Supreme Court of that state and the judgment affirmed by the United States Supreme Court in the *Heisler* case. But it is to be noted that the excessiveness of the tax was not an issue in the second case, and rightly so, since the tax rate had been cut in two and there were no allegations in the complaint that the result of the operation of the tax would be to produce an excessive amount of revenue. The *Heisler* case, is, therefore, in no sense in conflict with the *Alden* case so far as the effect of an excessive revenue upon the validity of a tax is concerned.

g. *It was the intent and purpose of the Legislature to pass an act regulating the catch of fish and not for revenue purposes.*

Subdivision (h) of the third affirmative defense contains the following allegation:

> "In this connection defendant alleges that the Legislature in passing this law well knew that the tax would produce a revenue largely in excess of governmental needs, and that the purpose of the Legislature in imposing such an excessive tax was to regulate the taking of salmon from the territorial waters and to discourage the taking thereof by large concerns such as the defendant."

In subdivision (i) of the third affirmative defense it is alleged:

> "That the purpose of increasing said taxes as aforesaid was to discourage the packers from packing in excess of 10,000 cases of salmon of the varieties of reds, kings and sockeyes, and in excess of 25,000 cases of cohoes, medium reds and pinks, and to regulate the business of said packers and this defendant in the production of their canneries."

In subdivision (j) of the third affirmative defense there is the following allegation:

> "That said license fees, taxes or charges—will result in a revenue grossly in excess of any possible need of said Territory and that such fact was well known by said Legislature at the time said Acts were enacted; that it was at the time of the passage of said Chapter 101, Alaska Session Laws 1923, openly claimed by the Legislature that the purpose of the passage of said Chapter of the Laws of Alaska 1923 was to regulate the fishing and catching of salmon."

The foregoing allegations which stand here undenied show three things as to the intent of the Legislature in enacting this statute:

1. That it was the intent of the Legislature to regulate fisheries and not to obtain revenue;

2. That the Legislature knew that the revenue realized would be grossly in excess of the needs of the Territory;

3. That the members of the Legislature openly stated before the passage of the statute that their knowledge and their intention was as above stated.

h. *All of the circumstances connected with this case tend to show that the Legislature intended to prohibit and to penalize rather than to tax for revenue.*

The upward graduated feature of the tax, the income tax clause, the passage of the closed season law and the exemption of chums from the surtax are all matters appearing either on the face of the act itself or are to be discovered by a comparison of the act with other statutes of Alaska. So far as these matters are concerned there can be no question that they not only show the purpose of the Legislature in passing the tax, but they are pertinent to disclose such purpose.

In the case of *Elmer v. Wallace,* 275 Fed. 86, the court had under consideration the validity of a tax imposed by the State of Alabama upon fresh shrimps. This tax was quadrupled in the case of shrimps taken in and shipped outside the state. The court held that despite the characterization of the act as a revenue measure, this must be regarded as a restriction upon the taking of shrimps, and particularly upon the

shipping of shrimps in interstate commerce and shows that the courts always seek the true nature of the statute regardless of the name it bears.

It will probably be claimed that the excessiveness of the revenue raised and the statements contained in the answer with regard to the intent of the Legislature may not be relied upon to show the actual purpose of the legislation, as it has been stated in some cases that the nature of legislation is to be discovered upon its face and not by reference to a characterization of such purpose. Such a contention as this is contained in *Alaska Fish Co. v. Smith,* 255 U. S. 44. That case involved the legality of a tax in the guise of a license fee of $2.00 per barrel and $2.00 per ton upon persons manufacturing fish oil, fertilizer and fish meal from herring. It was there urged that the tax was prohibitory and was, therefore, a disguised attempt to pass a fish law. This tax is easily distinguishable from the one at bar by reason of the fact that it was not in any way graduated upward, nor did the statute purport on its face to do anything other than raise revenue. There is nothing in the case to show that the revenue would be grossly or at all in excess of the needs of the Territory or that the members of the Legislature openly asserted at the time of the passage of the act that they intended to regulate fisheries. The *Smith* case is hereafter referred to.

Furthermore, any intimations contained in the case with regard to the unimportance of the intent of the Legislature in passing an act must be regarded as having been overruled by the child labor tax case, *Bailey v. Drexel Furniture Co.,* 259 U. S. 20. That case holds

unconstitutional the latest attempt on the part of Congress to pass a Federal Child Labor Bill. The bill took the form of a so-called excise tax of 10% on the entire net profits of any mine, mill, etc., where children under the age of fourteen years were employed. The court first held that the case was similar in principle to *Hammer v. Dagenhart,* 247 U. S. 251, which had decided that a federal statute prohibiting the transportation through interstate commerce of goods made at a factory in which children were employed was unconstitutional, there being nothing inherently objectionable in the goods so transported.

This court then held that there is a certain point where a so-called excise tax, because of the manifest purpose of the legislative body, becomes a penalty. As such it may not be upheld where the legislative body did not have both the power to levy an actual excise tax and the right directly and openly to regulate or prohibit the activity in question.

The language in this case is so pertinent to the discussion here that we shall set forth some of it at length (at pages 36, 37):

> "* * * If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer *solely* from its heavy burden that the act intends a prohibition instead of a tax. * * *
>
> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presump-

tion of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

"The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. *Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another.* Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard."

In distinguishing the case of *Veazie Bank v. Fenno*, 8 Wall. 533, which case involved the constitutionality of the federal statute putting a 10% tax upon the circulation of the notes of State banks, Mr. Chief Justice Taft said (at page 41):

> "It will be observed that the sole objection to the tax there was its excessive character. *Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all.* There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern and jurisdiction through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax."

The Chief Justice also distinguished *McCray v. United States*, 195 U. S. 27. That was a case in which Congress increased the tax upon yellow oleomargarine from 2¢ to 10¢ per pound, leaving the tax on white oleomargarine at 1¼¢ a pound as it had stood before. It was held by the Supreme Court that this tax was constitutional. Mr. Chief Justice Taft says (at page 42):

> "* * * It was the same principle as that applied in the Veazie Bank Case. This was that Congress in selecting its subjects for taxation might impose the burden where and as it would and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face as does the law before us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."

Another case which looks to the legislative intent is *Alaska Pacific Fisheries v. Territory of Alaska,* 236 Fed. 52, 55, in which the court said:

> "It is plain, we think, that our conclusion should be arrived at by assuming that *the great object* of the Legislative Act of April 29, 1915, quoted above was to create revenue, and that in its scheme of license taxes the Legislature had in mind provision for the expense of administration of the Territory."

We submit that in the case at bar, as in the child labor tax case there are disclosed many detailed specifications of the attempted regulation of a concern and business with a heavy exaction to promote the efficacy of such regulation.

That the court must look behind the form and language of tax statutes when deciding as to their validity see further:

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362;

Collins v. New Hampshire, 171 U. S. 30, 34.

2. The Question Involved Herein Has Not Been Decided Either Expressly or Impliedly By Previous Decisions.

In the following cases the application of the exception clause of the Organic Act in relation to salmon fisheries was considered:

Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52;

Alaska Salmon Co. v. Territory of Alaska, 236 Fed. 62;

Alaska Fish Co. v. Smith, 255 U. S. 44.

Other cases, which bear indirectly upon the same subject, are:

Haavik v. Alaska Packers Association, 263 U. S. 510;

Auk Bay Salmon Canning Co. v. United States, 300 Fed. 907.

In the *Alaska Pacific Fisheries* and the *Alaska Salmon Co.* cases was considered that portion of the Territorial Act enacted in 1915, which imposed upon fish traps a license charge of $100.00 per annum and upon salmon canneries a license charge of seven cents per case on sockeye and king salmon and one-half cent a case on humpback, cohoe, or chum salmon. It was held that the great object of the act there considered was "to create a revenue," and that it did not conflict with the Organic Act because such Organic Act contained the further proviso that the provision with holding power to pass a fish law should not "operate to prevent the Legislature from imposing other and additional taxes or licenses." It is important, however, to note that the court in the *Alaska Pacific Fisheries* case held that "if it were not for the last quoted proviso, any purported taxation by the Legislature on either fish traps or cases of canned salmon would be invalid, since it would 'alter, amend, modify or repeal' the then existing fish laws of Congress." In other words, these two decisions go no further than to hold that the authority given the Legislature to "impose other and additional taxes or licenses" overrode in the single particular of taxation the general proviso that the Legislature could not pass

any laws which would alter, amend, modify or repeal the laws of Congress relating to fish in Alaska.

The point there decided was that the *flat* tax levied by the Territorial Legislature either upon fish traps or cases of canned salmon was not invalid, although it might be in addition to similar license fees exacted by the laws of Congress. *The same question would have been presented here if, in the present case, the plaintiff in error had refused to pay the flat tax of ten cents per case imposed by subdivision b of Section 8 of the Act, adopted May 5, 1923.* But the plaintiff in error, as is disclosed by the record, has paid such flat tax and the validity of the same is in nowise involved here. Thus these decisions did not involve, nor was there discussed, the question of the validity of a Territorial Act which is in fact a regulatory and not a revenue measure. To the contrary, as noted, they rest entirely upon the proposition that the taxes imposed by the Act of 1915 were for *revenue only* without any feature of regulation and as such were permitted by the special proviso above noted.

The case of *Alaska Fish Co. v. Smith,* 255 U. S. 44, is cited in the opinion of the court below and has been previously referred to in this brief. In that case the court had for consideration the validity of a license tax of "two dollars a barrel and two dollars a ton respectively, upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring." The precise phraseology of the act (Laws of 1917, page 203) is as follows:

> "10th: Fish-Oil-Works: Using Herring in whole or in part in the manufacture of fish-oil; two dollars per barrel.

> Fertilizer and Fish Meal Plants: Manufacturing fertilizer and Fish Meal in whole or in part from herring; two dollars per ton."

The court held in the cited case that this tax on fish-oil-works did not contravene the Organic Act. In principle its decision was precisely the same as that decided in *Alaska Pacific Fisheries v. Territory of Alaska,* supra. But it will be noted that the act proposing this license tax on fish-oil-works had no characteristic other than baldly designating the amount per barrel or per ton which should be paid by such works. *There was no attempted classification or other regulatory feature of the act other than the levying of the tax.* Thus, this and the other cited cases merely hold that a license tax, as such, without any regulatory feature, *is not a fish law* and does not contravene the Organic Act. The same is true of the *Haavik* case, in which an annual poll tax imposed on non-resident fishermen in Alaska was held valid. It was held that, inasmuch as these fishermen resided for a good part of the year in Alaska and pursued there a substantial means of livelihood, they were subject to such a tax.

A tax as such upon a case of canned salmon, a barrel of herring or a fisherman has been held by these cases insufficient to make the measure a "fish law." That is, the effect of such tax on the salmon industry is too remote to have it classified as a "fish" law, but, if there be any merit in the present writ of error before this court, it must be that the Act of 1923, departing from previous acts, did attempt to not only levy a flat tax but, by the surtax here challenged, to regulate the salmon industry. It may be quite con-

sistent with the Organic Act to increase the general tax rate on cases of canned salmon above the rate fixed by the Act of Congress, but this cannot be done if it be merely a disguised attempt to so classify the objects of the tax as to *in fact* regulate the catching of salmon.

We understand that the above cited cases have gone no further than to sustain the power of the Alaskan Legislature to impose other and additional taxes to those already imposed by Congress.

They have said that the Territorial Legislature may impose these additional taxes and that such measure is not a fish law, but they have not said that these taxes may be so classified that the inevitable result is to regulate the catching of salmon.

But the particular subdivision of the Act of 1923 here attacked is not, as we assert, a revenue measure, but one to regulate the catching of salmon. The object sought was to impose by the indirect method of taxation restrictions upon the catch in a particular stream or locality. We are not here considering the power of the Territorial Legislature to impose "other and additional taxes" to those already imposed by Congress. To the contrary, we are confining our attention to a measure which, by reason of its arbitrary classification, has, as we claim, obviously ceased to be a revenue measure and has intruded into the domain of regulation. The additional tax graded proportionately on the output of any one cannery is not "another and additional tax or license" upon the salmon catching industry in Alaska, but upon the output of

a particular cannery *as such*. It is therefore regulatory.

3. The Classification Upon Which the Surtax is Based is Arbitrary and Unreasonable and Opposed to the Due Process Clauses of the Fifth and Fourteenth Amendments.

It will not be denied that a taxing power may make classifications, particularly as they relate to excise or business taxes. But this court has said that such classifications

> " 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' Gulf, Colorado and Santa Fe Railway v. Ellis, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its

> operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."
>
> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560.

At the outset it may be made clear that we no longer consider as open the question of the effect of the due process clauses of the Fifth and Fourteenth Amendments upon uniformity of taxation. We recognize that repeated decisions of the court are that such uniformity is geographical only, and that any contention to the contrary would be futile.

Patten v. Brady, 184 U. S. 608;
Knowlton v. Moore, 178 U. S. 41;
Brushaber v. Union Pacific Railroad Co., 240 U. S. 1.

It is equally undeniable that, if a classification be reasonable, the rule requires only that the tax shall bear equally upon all members of the same class.

Clark v. Titusville, 184 U. S. 329;
Magoun v. Illinois Trust Bank, 170 U. S. 283.

Does this Alaskan surtax bear equally upon all members of the same class, viz., "fisheries"? It obviously does not.

We first invite attention to the act itself, Chapter 101 of the Laws of Alaska, 1923. It is entitled: "An Act to amend Chapter 31, Laws of 1921, being an Act entitled, 'An Act to establish a system of license taxation, to provide for the collection thereof and to provide punishment for doing business without a license,

repealing Chapter 33 of the Session Laws of 1919, and declaring an emergency'." The act thereupon proceeds to divide all lines of business subject to the license tax of Alaska into twenty-one separate classes, ranging from a tax upon attorneys-at-law, chiropractors, and doctors, who are named in subdivision 1 of Section 1, to those who operate saw-mills, who are included in subdivision 21 of said section. "Fisheries" is the 8th of these subdivisions or lines of business. The previous acts of the Legislature had adopted the same divisions or classifications and had fixed the same rate of taxation upon all those who canned the same variety of fish. They had also fixed a uniform license charge upon all fish traps regardless of the amount caught in any one particular trap.

The surtax here attacked destroys this equality.

We have already shown that a packer, who packs 100,000 cases of red salmon in one cannery, must pay a yearly surtax alone—in addition to the $10,000.00 imposed by the normal tax—of $13,750.00; whereas the packer of the same sized pack of red salmon in two canneries must pay only $7,500.00, and in three canneries $4,749.99. The cannery man, who can put up his pack of 100,000 cases in one cannery, must pay nearly three times as much as one who requires three canneries to make the same pack. If the pack goes to higher figures and includes one who packs 1,000,000 cases, while the number of canneries be increased to, say, ten, the inequality becomes increasingly more glaring.

The rate per case also by this surtax loses all resemblance to equality. If this surtax provision re-

main, the rate per case upon reds packed in any one cannery would be as follows: Where no more than 10,000 cases are packed, it would be 10 cents per case. If 25,000 cases are packed in that cannery, the rate would be 13 cents per case. If 40,000 were packed, the rate would be 15 6/10 cents per case. If 50,000 cases were packed, the rate would be 17½ cents per case, and if 100,000 cases were packed, the rate would be 23 7/10 cents per case.

The tax imposed by subdivision (h) of paragraph 8th on fish traps is not in fact involved directly in this action, but it may be used as an illustration of the fantastic departure from any principle of equality in taxation upon salmon packers. Prior to 1923, any operator of a fish trap was required to pay a certain sum per annum irrespective of the number of fish that might be caught in such trap, but the aforesaid subdivision (h) imposes an additional tax of $2.00 per thousand upon all fish caught in any one trap in excess of 100,000. It requires from fourteen to eighteen red salmon to the case, which consists of forty-eight one pound cans or tins. This would require approximately one million and a half fish to fill 100,000 cases. If all the fish necessary to fill 100,000 cases were caught in one trap, the surtax for the trap alone would be $3,000.00; whereas if they were caught in fifteen traps, the surtax would be nothing.

These figures place beyond the necessity of argument the fact that all salmon packers are not, under this present law, taxed alike. Although their manufactured product be identical in kind and value, the tax they are required to pay is very different. Indeed,

this inequality in taxation is expressly conceded by the court below, as well as by the attorney general. In its opinion the United States Circuit Court of Appeals said: "As admitted by the attorney for the defendant in error, they undoubtedly discriminate in favor of small canneries and against the large ones."

Does this admitted difference in the taxation burden "bear any just and proper relation to the attempted classification"? If the Territorial Legislature had any power to regulate the salmon industry or the canning business, such inequality in taxation might possibly be justified in the power of control or police power over an industry. But such control having been expressly withheld, the classification attempted must rest upon some reasonable basis of distinction. This distinction must be grounded upon *revenue*, the only subject matter in respect to which the Legislature had power to act.

From a revenue standpoint, that is, a measure which would look for its justification to the creation of funds necessary to conduct the business of the Territory, there can be no possible difference if the salmon be packed in one cannery or in twenty canneries, any more than, from a revenue standpoint, there can be any difference if a lawyer, doctor or merchant transact a given volume of business in one or more offices or stores.

The question here involved, to-wit, the right to create inequalities in the taxation burden by the artificial creation of various classes, is not a new one to this court. In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, it was exhaustively considered. There

was considered a statute of the State of Kansas of March 3, 1897, by which it was in brief provided that any stock yard within the State of Kansas, which had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep, should be limited to certain charges for the driving, yarding, watering and weighing of stock. In other words, the act attempted to make an arbitrary distinction between stock yards which had the above named volume of business, and those which handled less cattle, hogs or sheep. Two great questions were considered by the court. As to the first of these questions, six of the justices believed it unnecessary to express an opinion. But as to the second, the court was unanimous. This second question was as to whether or not the Legislature of the state had the right to classify stock yards in the manner provided, so that a burden would be cast upon a stock yard which handled not less than 100 head of cattle per day, which was not cast upon a stock yard which had a less volume of business. In this connection, the court said:

> "So again exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed on certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general

interests, which interests may often be promoted by certain regulations affecting one class which do not affect another—certain burdens imposed on one which do not rest upon another.

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretence that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

It is interesting to note that the argument, which was used by the attorney general for Kansas in the above case, was practically identical with the argument now used by the attorney general for Alaska in the present case. They have both asserted that the public had a greater interest in the business of a large stock yard or cannery than it had in the business of a smaller one, and that the Legislature could and indeed should correct that inequality by levying such a tax that the two would become equal.

In *Truax v. Raich*, 239 U. S. 33, the court held that a law of Arizona, which provided that not less than eighty per cent of the employees of any company in the state should be qualified electors or native born citizens of the United States, was invalid, and that the classification attempted was not a reasonable one, since the authority to control immigration was vested solely in the Federal Government and the attempt of a state to base a classification upon a subject matter over which it had no jurisdiction was unlawful. *"That underlying the classification is the authority to deal with that to which the legislation is aimed."*

There are a number of decisions of the state courts which deal with this subject. In the case of *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 55 S. W. 627 (the department store case), it was held that no distinction could be made as to a license tax based upon the *place* where the business was conducted. In that case was considered what is known as the anti-department store law of the State of Missouri by which merchants were divided into a certain number of classes arranged as to the respective number of employees. A firm, which

employed more than fifteen persons, should pay a license of from $300.00 to $500.00, and a firm, which employed less than fifteen persons, was required to pay a lesser license fee. It was held that this law was invalid because it was not a tax which was uniform upon the same class of subjects, and was an unwarranted discrimination against a department store. The same argument is applicable here. The surtax provisions in the statute under consideration are a discrimination against the large cannery as opposed to a small one.

Other decisions of some of the states seem pertinent. In *City of Los Angeles v. Lankershim,* 160 Cal. 800, there was under consideration an ordinance of the City of Los Angeles, which required a license for every building containing more than thirty rooms, and a fee of $1.00 per year for each office room and $3.00 per year for each storeroom contained in said building. It was urged that the ordinance was an unjust discrimination between persons engaged in the same business, and that it imposed a burden upon one owner which it did not impose upon another in the same class. The court said (pages 802, 803):

> "Surely, a man who owns a building with thirty office rooms for rent is engaged in no different 'occupation' from that of a man alongside of him owning an office building with twenty-nine office rooms to rent, and if, as in the case of this ordinance, a tax is to be levied at the rate of a dollar a room upon the person engaged in the 'occupation' of renting office rooms no reason appears or is shown why, belonging to the same class as they do, the man who rents five office rooms should not pay five dollars if the man who rents fifty is compelled to pay fifty dollars. The contention

that, for the purpose of taxation, the municipal council may draw a class line at thirty rooms and declare those who rent thirty rooms and over are engaged in an occupation, while those who rent less than thirty rooms are not engaged in the same occupation, is purely fanciful as would be plainly exemplified if the ordinance imposed a tax upon those who rent from one to thirty rooms and relieved from the tax those who rented over thirty rooms. Yet, if this asserted ground of classification is substantial, the city council would have the power to do precisely this thing.

* * * * * * *

"The well-settled rule that 'every intendment is to be indulged in favor of the validity of a municipal ordinance imposing a license fee for the carrying on of a particular business' means that a court will be zealous in its search for any substantial ground for upholding such an ordinance when attacked; but it does not mean that the court must shut its ears to reason and declare in every case that *because* an ordinance has been passed there must be valid reasons for its existence."

The California court in *In re Dees*, 46 Cal. App. 656, and 50 Cal. App. 11, held invalid a law placing a high license tax upon one engaged in the business of scalping theater tickets. In its opinion the court said (pages 660, 661):

"In considering the particular enactment the fact that it purports to be a revenue measure is not conclusive. 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under the solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public

health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the constitution.' (Mugler v. Kansas, 123 U. S. 661, (31 L. Ed. 205, 8 Sup. Ct. Rep. 297, see, also, Roses's U. S. Notes); Ex parte Whitwell, 98 Cal. 78, 79, (35 Am. St. Rep. 152. 19 L. R. A. 727, 32 Pac. 870).) *With what greater force does this reasoning apply in a case where the enactment purports to be a revenue measure, while it is in substance a prohibitive statute, or at least a regulatory one, as this so plainly appears to be.*

Considered as a revenue measure, the section under consideration, if it provides for any tax, provides for one upon single sales and not upon a business. It further is directed to a mode of selling without consideration either of essential differences in modes or the volume of business transacted. It cannot be upheld as a revenue measure for these reasons. (Merced County v. Helm, 102 Cal. 159-166, (36 Pac. 399); Ex parte Richardson, 170 Cal. 68, (148 Pac. 213).) As a police measure it is an unwarranted interference with the liberty of citizens of the state and the United States, not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision. (Ex parte Whitwell, 98 Cal. 73, (35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870); People v. Quarg, 149 Cal. 79-81, (117 Am. St. Rep. 115, 9 Ann. Cas. 747, 5 L. R. A. (N. S.) 183, 84 Pac. 766).)" (Italics ours.)

A strong case in our behalf is *Fiscal Court v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 298. In that case the license tax in question imposed a tax upon one, two, three and four-horse wagons, the graduations on the one, two and three-horse wagons

being, so far as could be observed, reasonable, whereas the tax upon four-horse wagons was out of all proportion. In the opinion in that case the court readily conceded the proposition that the reasonableness of a classification for the purpose of license taxes is ordinarily something for the Legislature to determine but it went on to say that where a classification was manifestly unequal and unreasonable it must fall. The court said:

> *"It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class but it cannot unjustly discriminate between the subdivisions so made."*

That the line of demarcation between respective classes created for taxation purposes must be drawn in accordance with the main legislative purpose is held further in the following cases:

Ex parte Franks, 52 Cal. 606;

Ex parte Richardson, 170 Cal. 68;

City of Seattle v. Deucker, 58 Wash. 501, 108 Pac. 1086.

The foregoing are some instances of statutory laws which have been held violative of the Fourteenth Amendment, although such statutes were enacted by the legislatures of sovereign states which had the power of regulation as well as of taxation. They seem to present more extreme cases in favor of the law than does the Territorial Act now under consideration,

since the power of the local Legislature is not so unlimited.

In the two cases of *Rast v. Van Deman & Lewis*, 240 U. S. 342, and *Tanner v. Little*, 240 U. S. 369, the court had under consideration the validity of certain classifications created by the States of Florida and Washington respectively. The classification was sustained in each case by this court. But in each case such ruling was fundamentally placed upon the power of regulation vested in the state legislature; "it being the conception of the legislature that the regulation and restriction was in the interest of the public welfare." The opinion in *Tanner v. Little* (page 383) then proceeds:

> "But the classification which was sustained in St. Louis Coal Co. v. Illinois, 185 U. S. 203, was condemned in Truax v. Raich, 239 U. S. 33. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80% qualified electors or native born citizens of the United States or of some subdivision of such. *The statute was held void because there was no authority to deal with that at which the legislation was aimed.* And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature. This has been declared many times."

It is therefore respectfully submitted that the classification herein attempted between a large and a small cannery has no legitimate relationship to the object of the statute, which must be for revenue only.

As already said if increased revenue was desired, the flat rate or the income tax of one per cent could have been raised, thus applying to all engaged in the salmon business in Alaska. This makes the object of the classification attempted between a large and a small cannery crystal clear. The classification was created not for the purpose of increasing the revenue of the Territory but of *regulating the salmon business.* If the Territorial Legislature has power to so classify salmon canneries or traps, it is apparent that this power may be used in such a way as to completely control the output of any particular cannery or the number of fish caught in any particular locality. If this classification be legal, then it of course is within the power of the Legislature to increase or so arrange its taxation that any cannery, which sought to pack more than 10,000 cases or any other minimum number, would be entirely prohibited from so doing by the amount of the tax imposed. The court below in its opinion has recognized this apparent equivocal position when it said: "Unlimited power to tax an industry in one sovereignty seems rather inconsistent with the reservation of a power to regulate that industry by another sovereignty, as the power to tax involves the power to destroy and may be so exercised as to render any attempt at regulation useless and abortive."

As already stated, this surtax is based upon the number of cases packed in a particular cannery without regard to its value. This feature of the act differs from the other numerous subdivisions of the same chapter where the license tax is based upon the

amount of business done, e. g., bakeries, subdivision (3); cold storage plants, subdivision (9); laundries, subdivision (12); meat markets, subdivision (13); mercantile establishments, subdivision (14). The amount of this business is expressed in dollars, not in volume.

It is submitted that any classification, by which an establishment having a large output of a manufactured product is taxed more *per unit* than a similar establishment having a smaller output, is an arbitrary classification, and from the standpoint of revenue has no reasonable or legitimate reference to the object to be attained. A cannery which has an output of 100,000 cases per year may in fact yield less profit or operate at a greater loss than one with an output of 10,000 cases, yet the tax is by this act much more onerous.

4. The Act Contains No Definition of the Term "Cannery", and Hence the Attempted Classification is so Ambiguous as to Make the Provision Void.

In *Gould v. Gould,* 245 U. S. 151, this court said:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of citizens. Citing cases."

There is no definition of the word "cannery" in the act here considered. The tax is "on a pack of kings, reds and sockeyes counted together at any one

cannery, etc." What is meant by the word "cannery"? By subdivision e of paragraph III of the answer (Trans. 38), it was alleged that it was impossible to determine what was meant by the word "cannery", in that its meaning was so uncertain that it could not be determined whether the word referred to a building or a plant.

This is not a captious or technical objection to the act, as anyone familiar with the salmon canning business will appreciate. For example, there are some streams in Alaska which are not over thirty feet wide, and there are located on each bank of the stream a number of cannery buildings. Each of these buildings may contain what is known as a "line" of machinery. That is, the whole process of canning fish may be done in that one building. But do these two or more buildings constitute one or more "canneries"? If they are only one "cannery", then this surtax is appreciably more than if they are two or more "canneries".

We are not here concerned with any "reasonable construction", because no discretion is left to the tax collecting authorities. It is fundamental that all tax laws must be definite and precise, and that the tax collector has no discretion or power of definition or of interpretation if a term used in a taxing act is susceptible of two different meanings. This issue is directly presented by the answer and evidence should have been permitted to determine whether or not the word "cannery" is a term which has a definite and clearly understood meaning.

The judgment of the court below should be reversed.

Dated, San Francisco,
October 19, 1925.

Respectfully submitted,
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(APPENDIX FOLLOWS.)

Appendix.

Appendix

The following is Section 8 of Chapter 101 of the Session Laws of Alaska of 1923, there being in all 21 sections in said statute:

"*8th:* Fisheries.

"(a) Clam canneries, three (3) cents per case.

"(b) Salmon canneries; on kings, reds, sockeyes, ten (10) cents per case.

"(c) On a pack of kings, reds and sockeyes, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of ten thousand (10,000) and not more than twenty-five thousand (25,000), five (5) cents per case; on all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), ten (10) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), fifteen (15) cents per case; on all cases in excess of fifty thousand (50,000), twenty (20) cents per case.

"(d) On medium reds, cohoes, and pinks, four and one-half (4½) cents per case.

"(e) On a pack of medium reds, cohoes, and pinks, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), two (2) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), four (4) cents per

case; on all cases in excess of fifty thousand (50,000), six (6) cents per case.

"(f) On chums, three (3) cents per case.

"In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other Territorial taxes paid.

"(g) Salteries: Fifteen (15) cents per one hundred pounds of mild-cured red king salmon; five (5) cents per one hundred pounds on mild cured white king salmon; ten (10) cents per one hundred pounds on salted codfish; two and one-half (2½) cents per one hundred pounds on all other salted and mild-cured fish.

"(h) Fish traps, fixed or floating, two hundred ($200.00) dollars per annum, so-called dummy traps included; and an additional tax of two ($2.00) dollars per one thousand shall be paid on all fish caught in any one trap in excess of one hundred thousand (100,000).

"(i) Gill nets and stake nets, two ($2.00) dollars per one hundred fathoms, or fraction thereof.

"(j) Seines, ten ($10.00) dollars for the first one hundred fifty (150) fathoms, and five ($5.00) dollars additional for each twenty-five (25) additional fathoms or fraction thereof.

"(k) Fishermen who are not residents of the Territory, five ($5.00) dollars per annum. The term 'fishermen' shall mean to include all persons employed on a boat engaged in fishing. This tax on non-resident fishermen shall continue only until January 1, 1924."